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Supreme Court of the United States

October Term, 1936.

No. 570.

SOUTHERN NATURAL GAS CORPORATION AND AMERICAN SURETY COMPANY OF NEW YORK,

Appellants,

vs.

STATE OF ALABAMA,

Appellee.

APPEAL FROM THE SUPREME COURT OF THE STATE OF ALABAMA.

BRIEF FOR APPELLANTS

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APPEAL FROM THE SUPREME COURT OF THE STATE OF ALABAMA.

BRIEF FOR APPELLANTS

OPINIONS BELOW.

The opinion of the Supreme Court of Alabama has not been officially reported but is unofficially reported in 170 Southern, p. 178. It is printed in the Statement as to Jurisdiction filed herein, beginning at p. 7, and in the Record, p. 55.

THE JURISDICTION OF THIS COURT.

A statement of jurisdiction has heretofore been filed with the Court, as required by Rule 12. The jurisdiction is

defined in Section 237(a) of the Judicial Code (28 U.S.C. Sec. 344(a)) as amended by the Acts of Jan. 31, 1928, and April 26, 1928 (45 Stat. 54, 466), providing for review by appeal of a final judgment in favor of the validity of a State statute as against a claim of invalidity under the Constitution of the United States.

The Supreme Court of Alabama, the highest court of that State, rendered a final money judgment for $15,466.69* against appellant Southern Natural Gas Corporation, and against American Surety Company of New York as its surety, in favor of the State, for franchise taxes assessed under color of the State tax statute mentiond below, for the year 1931, on the theory that appellant was doing business in Alabama subject to the tax and that all of its property in Alabama ($5,523,715) whether used in that business or not, or whether used exclusively in interstate commerce, should be used as a measure of the tax within the meaning of the statute.

The corporation contends that the assessment in its entirety constituted a burden on the interstate commerce to which appellant exclusively devoted its property and confined its business in Alabama, in such wise that the application of the statute to that end was in violation of Section 8 of Article I of the Constitution; and that as applied to appellant, a foreign corporation, the statute was and is in violation of the equal protection and due process clauses of the Fourteenth Amendment (R., p. 8-9).

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* Presumably the amount of the tax assessed by the Alabama State Tax Commission ($11,047.43) with interest from May 13, 1931 to October 15, 1936 (R., p. 14, 84)

STATEMENT OF THE CASE

The Nature of Appellant's Property and Business in Alabama.

As shown by the agreed statement (R., p. 17-19), appellant was, during the time for which this tax is sought to be levied, engaged in the business of transporting natural gas from the fields in northern Louisiana into the states of Mississippi, Alabama and Georgia, under contracts to make deliveries of the Louisiana gas at agreed points of connection between the receivers' lines and appellant's interstate mains.

All gas delivered in Alabama moved under main line pressure in continuous movement from the wells in Louisiana to the immediate point of delivery in Alabama, where it was reduced in pressure and measured for the sole purpose of effecting delivery (R., p. 18). *

Appellant had only four customers in Alabama, all purchasing under specific contracts contemplating the transportation of the gas from the Louisiana fields. Three of these customers were public utilities engaged in the local distribution of gas. One was a large industrial consumer which purchased the gas under contract for its own use or that of affiliated units of the United States Steel Corporation (R., p. 17, 18), to whose plants the mains of appellant were extended in accordance with the interstate contract; but in the branch mains to reach this industry there was no "working over" or reduction in pressure

* It is a matter of general knowledge that long distance transmission of natural gas (appellant's system comprising about 1000 miles) moves under line pressure of approximately 400 pounds, greatly in excess of the requirement or required tensile strength of the distribution pipes of the utility or other purchasers from the long distance transportation company.

as the gas turned out of the cross-state line; and, no intentional reduction in pressure until the act and moment of delivery. In short, the gas in all cases moved under unregulated gas pressure to the point of delivery (R., p. 18, quoted infra).

Appellant was a Delaware corporation. Its interstate pipe line system reached from Louisiana to Georgia. The Company maintained its principal office, within Alabama, at Birmingham, and performed general corporate acts within the State, all solely in furtherance of and accessorial to the wholesale transportation and delivery of gas in interstate commerce. The agreed statement of facts recites that:

> "the corporation transacted and proposed to transact no business within the State of Alabama other than the business of selling, transmitting and delivering gas as aforesaid and in the manner hereinbefore set out, or business incidental to or directly accessorial to such sale, transmission and delivery" (R., p. 19). * * * * *
>
> "All deliveries made by appellant to all of said purchasers were made under the following conditions: "The gas sold to the said purchasers was gas delivered in continuous movement from the gas fields in Louisiana or Mississippi without break or interruption, to the point where it was delivered to and received by the purchaser, viz: the meter house at which the gas so sold was measured for the purpose of payment.
>
> "In cases of all deliveries made by appellant, the gas was moved under unregulated gas pressure, as produced by the natural pressure of the gas wells, to the designated points of delivery; in all cases in continuous flow from the Louisiana or Mississippi gas fields without cessation from the beginning of move-

ment outside of the State of Alabama until delivery" (R., p. 18).

The statute involved and supplementary statutes necessary to be considered

The Alabama Constitution and statutes have, in combination, for a number of years required of foreign corporations "doing business' in Alabama compliance with three excise tax requirements, under penalties, in addition to payment of the customary ad valorem property taxes. The provisions are set out below.* Here, they may be summarized as follows, as they existed in 1931 and have continued without substantial change to date:**

(1) Initial qualification tax, or admission fee, required only on initial qualificat on to do business in Alabama. Acts 1927, Sec. 42, p 171, *infra.* This initial qualification was complied with by appellant in 1928 (R., p. 11, bottom line).

(2) An annual permit tax, based on a return required to be made by February 1 of each year, and paid to the Secretary of State according to the face of the return (ib.)***.

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* The full text of all Alabama statutes referred to in this brief is set out in a separate Appendix, filed with this brief.

**While this record involves only the year 1931, precisely the same question exists and is undisposed of for subsequent years, for which back assessments are pending before the Tax Commission.

***A copy of the "certificate of application" for the 1931 permit filed by appellant, dated December 23, 1930, reporting its principal and local place of business and agent for service, and asserting

"No capital in State used in intrastate commerce. Company engaged solely in interstate commerce,"

is set out in the Appendix; also copy of the Permit for the year 1931, dated January 2, 1931, issued by the Secretary of State pursuant to the application. The significant part is here quoted and italicized for convenient reference:

"THIS IS TO CERTIFY That Southern Natural Gas Corporation, a corporation organized under the laws of Delaware and engaged in the business of *Interstate transportation & sale of gas for light, heat, etc.* has paid the Secretary of State the sum above set out as required by Section 42 of an Act approved July 22, 1927. This permit is therefore issued authorizing the doing of business in the State of Alabama by said corporation for the year 1931, and is subject to the terms and conditions of said Act." 1-2-1931, John Brandon, Secretary of State.

This was in all respects a true license or privilege tax, on payment of which a license or permit was issued by the Secretary of State, good for the year.

(3) An annual tax levied not by way of permit or as a condition precedent to doing business, but in respect to the actual doing of business in Alabama; assessed by the State Tax Commission following a return required to be filed by March 15 of each year, and permitting appeal from the assessment (Ib., Sec. 54, p. 176, *infra*). This is the statutory provision under color of which was assessed the tax involved on this appeal. This tax is not a license tax in form but is a true transaction tax—the transaction taxed being the actual doing of business with capital actually employed in that business in Alabama. The incidence of the tax herein assessed is upon interstate business. The tax was measured by property in part admittedly and, as appellant contends, used and held for use solely in interstate commerce.

The official form of this return as made by appellant for 1931 is shown beginning at Fol. 14 (R., p. 9-14). The Exhibit attached to the return is misplaced in the record and is to be found beginning line 6, p. 4, running through page 7.

The three types of tax scheduled above arise out of the following Constitutional and statutory provisions:

Sec. 232, Constitution of 1901

Section 232 of the Alabama Constitution of 1901 provides:

> "No foreign corporation *shall do any business** in this state without having at least one known place of business and an authorized agent or agents therein, and without filing with the secretary of state a certified copy of its articles of incorporation or association. * * * The legis-

* Italics in quotations in this brief are, in general, supplied. See Appendix for full text of statutes quoted.

lature shall, by general law, provide for the payment to the State of Alabama of a *franchise tax* by such corporation, but such franchise shall be based on the *actual* amount of capital *employed in this State.* * * * "

This section of the Constitution of 1901 is not self enacting as to the tax contemplated. The statutes giving effect to the enactment are and have been overlapping and confusing. They have been embodied at times in the Code; at times in the successive Revenue Acts, which are not uniformly codified, and at times are in both, based on different theories, and bearing different rates.

Section 7216 of the Code of 1923 (which is the present Code, Michie's Code of 1928 being a private compilation and not official) asserts that the qualifying tax or admission fee levied by section 7214 is the "franchise tax" exacted under section 232 of the Constitution and "shall be paid but once only." Section 7214 was repealed by Section 312 of the Revenue Act of 1935 (at p. 383); but even before repeal it was asserted that Section 54 of the Act of 1927 was enacted pursuant to the mandate of Section 232 of the Constitution, thus leaving that matter in confusion. See opinion of Mr. Justice Thomas in the instant case. (R., p. 68).

Thirty five years have elapsed since the ratification of the Constitution of 1901; yet the statutes and the decisions of the Alabama Supreme Court have left in confusion in other respects the question as to what statutes are in effect and as to their meaning; but there is no doubt that penalties of the utmost severity lie in wait for the interstate, foreign corporation which guesses wrong.

For instance, Justice Thomas' opinion (R., p. 69) recognizes that Code section 7209, 7211, 7212, 7213, 7216 and 7220, relating to penalties, were in effect in 1931. This sum-

mary of penalties omits applicable provisions, doubled and redoubled, and of even greater severity; but that cross-section is enough. It is only necessary to compare sections 7216 (and its companion section 7215) with section 42 of the Revenue Act of 1927, relating to so grave a matter as the invalidation of contracts, and sections 7219 and 7220, with section 42 of that Act, etc., also carrying the penalty of invalidation, to demonstrate the absence of coordination in the system and the confusion as to its interpretation; and to point out that the Circuit Judge who reviewed this record as the trial court selected to try appeals of this class held that appellant was subject to no tax (R., p. 50) whereas the Alabama Supreme Court holds that it was.

To summarize on that single point, we find in the laws of Alabama, admittedly in full force in 1931, the following statutes applying hard labor, fines, forfeitures, or invalidation of contracts against a foreign corporation or its agents for doing business in Alabama without a foreign corporation license: Sec. 5424 (fine and hard labor); Section 3731, 3732 (fine and hard labor); and 7208 (invalidating contracts); Sections 7211, 7212 and 7213 (fines and provisions as to prosecution); 7216 (vitiating contracts); 7220 (vitiating contracts). This is in addition to the prohibition and declaration of invalidity of contracts found in section 42 of the Act of 1927.

These cumulative, overlapping and unnecessary fines,* hard labor penalties, and denunciation of contracts confronted appellant in 1931, with no method available under the laws of Alabama to determine whether the operation of its interstate system would, inadvertently and unintentionally, cross the line

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* Unnecessary, that is, for the orderly collection of intelligible, valid taxes from a foreign corporation immovably located in the state with its interstate pipe line system.

of local business and set in motion the accumulation of penalties sprinkled through the statutes to catch the foreign corporation unintentionally doing some local act in the current of its interstate business. The facts stated are of the first importance to a correct understanding of the system as applied to an interstate transportation property which could not move out.

Specifically, the statutes here directly involved were these:

Initial and annual license to transact local business and penalties for not applying for and procuring license —Section 42, Revenue Act of 1927, page 171.

Section 42 of the Revenue Act approved July 22, 1927 (General Acts, 1927, at p. 171; App. p. 1) requires all foreign corporations before doing business at all in Alabama to register and obtain an initial and also, not later than February 1 of each year, an annual permit to do business in Alabama. There is no express exception of interstate commerce as was provided by Section 7217 of the Code with relation to the initial and annual permits there required. Section 42 imposed a drastic penalty of its own on all corporations which fail to comply (Acts 1927, p. 172) in addition to the general penalty of fine or hard labor (Code, Sec. 5424) for doing business without a license, the invalidation of all contracts and specific criminal penalties or fines directed at failure to take out these initial and annual licenses, found sprinkled and repeated through the Code sections above mentioned, viz: Sections 3731, 3732, 7208, 7211, 7212, 7213, 7216 and 7220.

These various statutes are collected in the Appendix. While there was and is uncertainty as to whether some of the Code provisions were repealed by the Revenue Acts

(although repeal was not reflected in the title), there is no uncertainty as to the chances which any corporation took which did interstate business in Alabama without also qualifying under the State law and purchasing a permit. We assert with all deference that the opinion of the Alabama Court in this case leaves the uncertainty so insoluble as to what the Supreme Court of Alabama regards as doing local business in connection with the necessary operations of an interstate business, as to leave no rational choice but to qualify initially and annually, as was done by appellant under full disclaimer of any intent to transact local business.

Because of this long standing uncertainty the practice of qualifying is almost universal, since the maximum license fee under Section 42 of the Act of 1927 was $100 and the license fee under Code section 7219 was $10 flat.

The report of the case indicates that this course of qualifying, but with no intent to do local business, was followed by the corporation in the *Anglo-Chilean Nitrate Case*, 225 Ala. 141, 288 U. S. 218; without, however, the unequivocal disclaimers followed by appellant here.

The course followed by appellant in 1931 and for previous years, was to disclaim liability for the tax but nevertheless to purchase the license under Section 42 of the Revenue Act of 1927. (See permit quoted above and also application and permit for 1931 set out in full in the Appendix). Payment of this license tax for the privilege of doing business does not relieve from or constitute a credit upon the tax separately levied upon the actual doing of business by section 54, mentioned next below, out of which this controversy immediately arises. We assert with confidence that the distinction between the complete and final license issued under this section 42 and the return and tax required under section

54 (constituting no license at all) were not clearly called to the attention of either court in the *Anglo-Chilean Case,* in which the dissenting justices regarded the return for the tax under section 54 *as an application for a license* thereby extending the base of the tax to include interstate property, potentially usable but not actually so used, as to those making the return of the tax; in effect changing the meaning of the tax provision according as a return was or was not made. Certainly changing the measure of the tax.

Nor was there called to the attention of either court in that case the practical compulsion to take out a permit under section 42, to avoid the risks of inadvertent non-compliance noted above; nor the effect of such practical compulsion on interstate commerce if the taking of the permit does in fact constitute a waiver of the Federal immunity protecting the use of interstate instrumentalities from state excise taxation.

The statute directly involved, taxing the actual doing of business by foreign corporations. Section 54, Revenue Act of 1927, page 176.

The statute under color of which the tax involved in this case was levied is Section 54 of the same Act (approved July 22, 1927, Gen. Acts 1927, p. 176; Appendix) of which the provision here pertinent is as follows:

> "Section 54. That every corporation organized under the law of any other state, nation, or territory, and *doing business in this state,* except strictly benevolent, educational or religious corporations, shall pay annually to the state an annual franchise tax of two dollars ($2.00) on each one thousand dollars of the actual amount of capital employed in this state. * * * "

This is in no sense a license or levied as a condition precedent to the doing of local business. It is simply an excise tax on the specific act, or transaction of doing business which attaches only if the object of the tax (i. e., doing business) exists. We point out below that the statutory antecedents of this section 54 did until 1919 prohibit the doing of local business unless this tax was also paid before it became delinquent.

Section 58, referring to the tax levied by Section 54, and not to the initial and annual permit or license taxes levied by Section 42, requires every foreign corporation subject to the tax levied by section 54, which it calls a franchise tax, to make a return on forms prepared by the Commission before March 15th in each year. Section 59 of the same Act imposes a per diem penalty for failure to file the return (Acts 1927, p. 177). The official form for return (R., p. 9, Fol. 14), on its face summarizes the penalties for failure to make that return: $10 per day, 20% interest.

The liability of appellant for tax penalties, had it ventured to make no return for 1931 under Section 54, *in reliance upon the asserted interstate character of its business,* would by now have reached the point of approximately 2175 penalty days.*

It is to be noted that no opportunity for protest to or hearing by the State Tax Commission is definitely provided for the foreign corporation confronted with the question of

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* At $10 per day, plus 1% per month and 8% annual interest on the principal amount of the tax claimed by the State $(11,047,43), the added penalty and interest would be approximately $23,959, to which, if the 5% penalty assessed by Sec. 64 for unsuccessful appeal be added, the penalties and interest would reach a total of over $25,000, in addition to the tax itself.

making the return. That is also true in the case of the drastic penalties surrounding the license requirements, *supra.**

So, in making the return under section 54, precisely as in the matter of taking out a license, appellant had no real option but to make the application for the license and, later on, the return for the foreign corporation excise tax. In each, appellant disclaimed liability for any tax.

(1) The application for license for 1931 disclaimed intent to do any local business in these words:

> "No capital invested in State used in intra-state commerce. Company engaged solely in interstate commerce."**

The license issued by the Secretary of State on January 2, 1931, described the licensee (appellant) as engaged in the business of "interstate transportation and sale of gas for light, heat, etc."

(2) The return for the foreign corporation excise or "franchise" tax levied by section 54 is not required (by section 58) to be made until March 15. Accordingly, on the 11th

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* The Commission has full power to initiate the assessment, to subpoena witnesses and documents for its ex parte consideration (Sec. 64, p. 180). After the assessment is made, notice must be given and appeal by the taxpayer to the Montgomery Circuit Court may be taken, at the risk, if unsuccessful in the Circuit Court, of a 5% penalty and interest (Sec. 66, p. 181). Appeal may be taken from the decision of the Circuit Court under the general statutes permitting appeals to the Supreme Court of Alabama. But these procedural remedies do not afford the foreign corporation any method whatever of ascertaining whether his interstate operations carry some unknown element of local business when it has to make the choice between taking the risk of the penalty under section 54 or taking out the annual permit under Section 42.

** This detail (as to the permit) does not appear in the record proper. The application for the permit and the permit itself are reproduced in the Appendix by photostatic process. Their accuracy will not, we assume, be questioned by the State.

day of March, 1931, under compulsion of the doubt and penalty above recited, appellant filed its return with the State Tax Commission of Alabama (R., p. 10-14)* in which it disclaimed any transaction or intention to transact local business with or in respect to any of its system or property in Alabama, but expressed a willingness to be taxed at a nominal amount, as had been accepted by the Commission for previous years.

The disclaimer of liability for the tax which appears in full in the record (R., p. 4, 5) is set out, for convenient reference, in the margin.**

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* Due to an error on the part of the State Tax Commission in preparing the original record for transmission to the Circuit Court of Montgomery County, the schedule attached by appellant to its return and referred to therein (R., p. 12, 13) was transposed, and appears, without distinguishing caption, beginning at the first paragraph on page 4 of the Record herein, continuing through page 7.

** "Southern Natural Gas Corporation has not transacted and does not propose to transact any local or intra-state business within the State of Alabama. Its sole function is the transmission of gas contracted for and purchased by it in the Monroe and Richland fields from points of delivery in said fields, within the State of Louisiana, to points in Mississippi, Alabama and Georgia. The gas so transported proceeds by continuous movement from the gas fields to destination without interruption.

"As such the business is solely interstate commerce.

Mo. v. Kan. Gas Co., 265 U. S. 298

Peoples Gas Co. v. Pub. Serv. Com'n, 270 U. S. 550, 554.

Pub. Util. Com'n. v. Attleboro Elec. Co., 273 U. S. 83

"The corporation's entire property in Alabama being used solely for the purpose of interstate commerce, the corporation's business is not subject to franchise or license taxes in Alabama.

Ozark Pipe Line Corp. v. Monier, 266 U. S. 555

Sprout v. South Bend, 277 U. S. 163.

"Any and all acts and transactions of the corporation within the State of Alabama, such as the construction, maintenance and operation of its pipe lines are solely in furtherance of and are incidental or accessorial to its said business of transporting and selling gas in interstate commerce.

"For the above stated reasons, the entire property, cash, and all other capital employed in Alabama on December 31, 1930, was directly employed or directly held for the transaction of the company's interstate business and no franchise tax is payable in respect thereof.

"The corporation does not now propose to transact any local business within the State but incidental matters may arise which might possibly make it desire to engage in some local transacation. In any such event a nominal amount of capital would be employed, in any event not to

Complying with the mandatory requirement of the form supplied by the State Tax Commission, appellant thereupon set out a description of its system and property located in Alabama, as returned by it for *ad valorem* assessment.

The Assessment by the State Tax Commission

The State Tax Commission interpreted that return as an acknowledgment of the transaction of taxable business in the State extending to the entire capital of $5,523,715 invested in appellant's interstate system within Alabama. The Commission accordingly made final its assessment of the tax under Section 54 at the statutory rate of $2.00 per $1000 applied to the stipulated value of the company's entire property in Alabama, resulting in a franchise tax against appellant in the amount of $11,047.43 (R., p. 14), "based upon capital employed in Alabama," as asserted in the assessment. It is to be noted that the Commission did not base the tax on property in Alabama which appellant might thereafter employ in local business, but on capital already employed, which was true only as to interstate business.

The Tax Commission granted no permit. It had no statutory authority to grant a permit. It made no assessment based on a permit. It did not assess or purport to assess a tax against appellant because appellant had qualified (to

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exceed $5,000. For that reason and in order to keep its qualification in effect as to any such incidental matter or matters, the corporation desires to make payment on the basis stated, viz: on the basis of a capital employed or to be employed in the transaction of local business in Alabama not exceeding $5,000.

"All of the fixed property and assets of the corporation are employed and are hereafter to be employed in interstate commerce. Any property or capital which might hereafter be employed in some minor or incidental transaction would be located in Jefferson County. If, however, the Commission should desire a schedule of the proportions of the company's interstate property within the state of Alabama, the same as proposed for assessment is as follows:"

avoid risks) in 1928 or obtained a license (to avoid the same risks) in 1931. The form did not require that appellant report nor did appellant report that appellant had procured a license for 1931. There is nothing in section 54 that directs the Commission to levy a tax based only on property employed in local business on those who do not take out a license and, in addition, on property employed exclusively in interstate commerce if the taxpayer has taken out a license. On its face the tax is the same whether a license under section 42 has been applied for or not. But the Alabama court treated the making of the return as including all appellant's property used in interstate commerce in the measure of the tax.

The Appeal from the Assessment

From this assessment an appeal was taken to the Circuit Court of Montgomery County, sitting in equity, as provided by the statute (Sec. 66, Acts 1927, p. 181). That court nullified the assessment on the ground that it was a burden on interstate commerce (R., pp. 50, 51).

On appeal by the State the Supreme Court rendered final judgment for the State, upon the agreed statement of facts on which the case had been submitted in the Circuit Court (R., p. 84).

There is, accordingly, no disputed question of fact in the record. The stipulation also asserts the ultimate facts in the matter.

The petition for appeal from the assessment became the pleading upon which the assessment was reconsidered de novo by the Circuit Court and annulled. The grounds upon which the assessment was challenged were as follows (R., pp. 2, 3):

(1) Appellant is not doing business and does not propose to transact any business in the State of Alabama except interstate commerce.

(2) Said assessment erroneously includes, in the computation of said assessment, property or investment employed and proposed to be employed by appellant solely in interstate commerce.

(3) Said assessment erroneously includes in the computation of the amount of said franchise items of property or capital not fairly referable to any local or intrastate transaction done or proposed by appellant in Alabama;

and also that the assessment was erroneous and void because

(a) The same is in violation of the provisions of the Revenue Act of 1927.

(b) Said assessment would deprive appellant of its property without due process of the law, and deny to it the equal protection of the law, in violation of the Fourteenth Amendment to the Federal Constitution.

(c) Said assessment is void as a direct burden on interstate commerce in violation of the Commerce Clause of the Federal Constitution.

(d) The items included in the computation of the assessment do not constitute capital employed in intrastate business by appellant within the State of Alabama, within the purview of Section 232 of the Constitution of Alabama.

Of the entire system of appellant within the State, 53.2% was located to the east of and beyond the point where any gas

from its system was delivered in Alabama, and that part (53.2%) of its system and property in Alabama was accordingly used solely for the transportation of gas through Alabama into the State of Georgia (R., p. 20). In short, this through-transit part of the system accounts for $5,855.23 of the tax.*

The value of that part of the system and property in Alabama which was employed in transporting the Louisiana gas (in interstate commerce) *to points of delivery in Alabama* was the remainder of the total property in Alabama ($2,605,198.67) upon which the tax, if assessed at the rate of $2.00 per $1000, would account for $5,210.39 of the total tax levied. The Tax Commission made no distinction between property used and property not used in making delivery of gas in Alabama.

The Supreme Court of Alabama, reversing the Circuit Court, sustained the tax in its entirety, on the ground that appellant was engaged in intrastate commerce within the State and that section 54 required the asessment of the excise tax based upon all property in the State, without discussion or consideration of the distinction between property used solely in the transportation of gas from Louisiana into Georgia or otherwise used exclusively in interstate commerce.

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* 53.2% of $5,523,715, the stipulated value of the property in Alabama, is $2,928,616.38, which, assessed at the rate of $2.00 per $1000, accounts for $5,855.23 of the tax levied, out of the total assessment of $11,047.43.

SUMMARY OF THE ARGUMENT

Southern Natural Gas Corporation was during the year for which this tax was assessed engaged exclusively in interstate commerce within the State of Alabama. Its entire business within the State was the operation of an interstate pipe line for the transportation of natural gas from Louisiana. All gas transported into Alabama was either carried through to its destination in the State of Georgia or delivered in Alabama under one of four contracts which required the company to transport into Alabama and there make delivery.

The principal office of the corporation was in Alabama, and various "corporate acts" are carried on within the State, but nothing was done which was not incidental to or directly accessorial to the business of operating the system, including the interstate delivery of gas under the four contracts.

The gas delivered under the four contracts was transported in continuous movement from Louisiana to the point of delivery in Alabama. It was delivered at transportation pressure, reduced only at the instant of delivery for the purpose of making delivery. Three of the purchasers in Alabama were intrastate utilities. The fourth was a large industrial consumer which entered into the agreement for itself and one or two affiliated companies. In all cases, appellant's ownership and control of the gas ceased at the point of delivery, as well as its responsibility.

The Alabama statute, as construed to impose the tax herein assessed against appellant Southern Natural Gas Corporation, is unconstitutional and void as a burden on interstate commerce in violation of Section 8 of Article 1 of the Constitution of the United States, in that the tax is measured by property held and used exclusively for interstate commerce, and in that the tax is levied directly upon the transaction of interstate commerce.

The statutory history of the franchise tax involved, as well as the construction of the statute by the Supreme Court of Alabama, and of this Court in the *Anglo-Chilean Case*, not affirmatively disturbed by the Alabama Supreme Court, demonstrate that the tax is an excise tax laid upon the actual doing of business and not upon the bare privilege, not utilized. Since, accordingly, appellant is engaged solely in interstate commerce and employs no capital in local transactions, the excise tax levied against appellant measured by its entire interstate property in Alabama, directly burdens interstate commerce.

Insofar as the tax is construed to be laid upon the mere authority or privilege of doing intrastate business, measured by the amount of capital employed solely in interstate commerce, the measure not only directly burdens interstate commerce but is arbitrary and unreasonable, and deprives the corporation of its property without due process of law in violation of the Fourteenth Amendment.

The tax cannot be sustained on the theory that it is laid upon a privilege requested, which was within the power of the State to withhold. Appellant, having entered the State with its interstate system, did not voluntarily apply to the State for the right or privilege of engaging in intrastate business to the extent of all its capital, or in fact, at all. It disclaimed any intent or desire to transact intrastate commerce but applied for a permit in order to avoid heavy penalties and forfeitures which attached to the inadvertent transaction of local business by a corporate organization set up in Alabama for the operation of an interstate transportation system. The penalties were so severe and so out of proportion to the small charge for a permit that appellant had no alternative but to take out the permit. This did not have the effect of waiving appellant's federal immunity as to the company's interstate commerce or as to excise taxes upon the holding or use of property exclusively for such commerce.

SPECIFICATION OF ERRORS

The Supreme Court of Alabama erred:

1. In reversing the decree of the Circuit Court which annulled the assessment of a franchise tax against appellant, Southern Natural Gas Corporation.

2. In failing to hold and decree that the tax assessed against appellant Southern Natural Gas Corporation under section 54 of the Revenue Act of 1927 was a direct burden upon interstate commerce.

3. In denying the claim of appellant Southern Natural Gas Corporation that application of section 54 of the Revenue Act of 1927 to its business in Alabama was in violation of Section 8 of Article I of the Constitution of the United States.

4. In failing to hold and adjudge that the Act as applied by the State Authorities was invalid because violative of the equal protection clause of the Fourteenth Amendment.

5. In rendering final judgment against both appellants for the amount of the tax assessed with interest from the date of assessment.

6. In not, in any event, excluding from the computation of the tax the 53.2% of the property used solely for transportation of gas to the State of Georgia.

ARGUMENT

I

Appellant was engaged solely in interstate commerce within the State of Alabama.

The agreed statement of facts (R., pp. 15 to 20, incl.) shows that appellant was doing precisely the same things in

Alabama that the Ozark Pipe Line Corporation did in Missouri—*Ozark Pipe Line Co. v. Monier*, 266 U. S. 555. The only business of this appellant in Alabama which was not done by the corporation as reviewed in that case was that, here, the appellant delivered interstate gas transported in continuous movement from Louisiana to the city or plant gate of three utilities and a major industrial purchaser in Alabama, all of whom received it and distributed or otherwise disposed of it for their own account within the State (R., p. 17, 18).

The Court below recites at length provisions of two of the contracts which are attached to the agreed statement (R., pp. 20 to 49), and concludes, from the detailed provisions there made as to price, delivery, and the basing of the price on the subsequent resale purpose, that the corporation was doing an intrastate business (170 So. at 189, 190; R., pp. 77, 79).

The court confused the question of situs of property for ad valorem taxation, which we will not discuss because clearly immaterial, with that of the nature of the business done with the property from the standpoint of excise taxation. The court appears to place considerable reliance upon the case of *Wheeling Steel Corporation v. Fox*, 298 U. S. 193 in arriving at the conclusion that appellant was engaged in intrastate business within the state, and therefore subject to a franchise or corporate excise tax levied as if upon actual local business. (170 So. at 189, 190; R., p. 77-79). Even in that aspect the Alabama Court fails to consider the question whether a tax upon transacting local business may be based upon property employed, not in the local business but solely in interstate commerce; 53.2% of the property of appellant in Alabama being admittedly used solely to deliver gas in Georgia and the entire property, as we contend, being used solely in interstate commerce.

It is hardly necessary to comment on the Alabama Court's thesis that delivery in Alabama of interstate gas constitutes in some vague way local business. Interstate commerce is not carried on in vacuo. Delivery of an interstate commodity and its attendant phenomena must take place in some State, conducted and energized by some organization. No contention has been made in this case by appellant that the tax situs of possible items of appellant's intangible assets, as well as of its physical properties in Alabama, is not within the state,—nor is any contention made that appellant's system and property, including local intangibles, is not subject to non-discriminatory ad valorem taxation there.*

The court quotes (170 So. 188; R., 76, 77) from the comment on Ozark Pipe Line Co. vs. Monier which is found in the dissenting opinion in *Anglo-Chilean Nitrate Sales Co. vs. Alabama*, 288 U. S. 218, 77 L. Ed. 710, containing the statement that the conduct of the corporation in the *Ozark* case was very different from that of the Nitrate Company, and that

> "Its (the Ozark Company's) business was the operation of a pipe line from oil wells in Oklahoma passing through Missouri to a destination in Illinois. Nothing was done in Missouri, or so the court interpreted the evidence, except in furtherance of transportation. Oil was neither received nor delivered in that state",

as if interstate commerce must never begin or end.

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* Ad valorem taxes are required by Section 211 of the Constitution of Alabama to be based on the fair market value of the property taxed. Assessments are supposed to be made at the rate of 60% of market value. Acts of 1919, page 287. Appellant in fact paid for the year 1931 ad valorem taxes to the State and its subdivisions on assessments made separately as to each County in which it owned property, as shown by the schedule attached to the return in this record. (R., p. 5).

Thereafter (R. p. 76) the Alabama court quotes directly from the Ozark case the statement that:

> "Some stress is laid upon the fact that the objects and purposes specified in appellant's articles of incorporation are not confined to the transporation of petroleum but include the doing of other business local in character. As to this, it is enough to say that none of these powers were in fact exercised in the state of Missouri; and, so far as this case is concerned, the power to tax depends upon what was done, and not upon what might have been done. Moreover, the license issued by the state authorized appellant to engage 'exclusively in the business of transporting crude petroleum by pipe line.' "—69 L. Ed. 444.

The distinction between the Ozark case and the case at bar is then stated by the Alabama Court as follows (R., p. 77):

> "The power to convey its gas to the several meters and its acts in so doing, diversion stations and transmission lines thereto, its devices for measuring the amount of natural or artificial gas, or mixed, if necessary to be supplied for use, augmenting or decreasing the flow, operation, control, and ownership of its switches and meters, use of its office furniture, book accounts, sales contracts, and agents engaged to keep same in Birmingham, Alabama were as much a part of appellee's plant and system operating and doing business and capital employed within the State, as the devices, force, or instrumentalities employed in directing, regulating, and forcing the transmission to the several points of distribution within the State. Brown v. Gerald et al, 100 Me. 351, 108 Am. St. Rep. 526, 61 Atl. 785; Sloss-Sheffield Steel & Iron Co. v, Mobley, Admrx., etc. 139 Ala. 425; Wheeling Steel Corporation v. Fox, State Tax Commissioner (October Term 1935) United States Supreme Court, Opinion No. 663. Such *intrastate corporate acts*, property holdings and the use thereof *constituted the doing of*

business in Alabama and the employment of its capital therein by a foreign corporation, within the definition of our decisions cited above and that of the Supreme Court Court of the United States in *East Ohio Gas Company v. Tax Commission* of Ohio et al.; 283 U. S. 465, 75 L. Ed. 1171, 1175. Louisville & N. R. R. Co. v. State, 201 Ala. 317, 78 So. 93; s, c. 248, U. S. 533, 63 L. Ed. 406; Kansas City M. & B. R. R. Co. v. Stiles, Judge, 182 Ala. 138, 62 So. 734; s. c. 242 U. S. 111, 61 L. Ed. 176; Wheeling Steel Corporation v. Fox, State Tax Commissioner, supra."

Interstate commerce must sometime come to an end, but we understand the law to be that the act of bringing it there and to an end by direct delivery of the product does not constitute the doing of local business which may be licensed by the State.

The statement, therefore, that the appellant's acts in conveying the gas to meters and the maintenance of measuring devices and the use or keeping of its accounts *relating to the interstate system* were "intrastate corporate acts . . . and constituted the doing of business in Alabama . . . within the definition of . . . East Ohio Gas Company v. Tax Commission of Ohio, 283 U. S. 465" is obviously erroneous, and runs counter to every decision of this Court on the question, including the case cited.

Public Utilities Commission v. Landon, 249 U. S. 236, 63 L. Ed. 577;

Missouri v. Kansas Natural Gas. Co., 265 U. S. 298, 68 L. Ed. 1027;

Peoples Natural Gas Co. v. Public Service Comm., 270 U. S. 550, 70 L. Ed. 726.

The *Kansas Natural Gas* cases involved operations substantially like those of appellant, except that the Kansas Nat-

ural Gas Company served a great many more local companies and exercised more extensive "corporate functions" in Missouri and Kansas than appellant here.

The *East Ohio Gas Company* case, cited by the court, carefully indicated the point at which interstate commerce ends and local business begins. There the company brought gas into Ohio by means of standard high pressure mains (the pressure being from 200 to 300 lbs. per square inch). Delivery into local distribution mains at city gates was made by reducing the pressure to 30 to 50 lbs., and from these mains it was again reduced for delivery to the consumer to a few ounces pressure. This court held that interstate commerce ended when the *third step* was reached, that is, when the pressure was almost eliminated and the gas put into the *local supply* mains (283 U. S. at 470, 471). There the same company conducted each step, made a vast number of deliveries as a utility, constituting continuous public service of a class peculiarly subject to regulation by the State, and was held to be engaged in local business.* Here, appellant's function is at an end with the *first of the series of steps* classified in the *East Ohio Case,* namely, upon delivery from the high pressure interstate mains owned and operated by it. (R., p. 18).

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* The Alabama Public Service Commission has never taken jurisdiction over appellant although the Act of 1923, (Acts 1923, p. 687, Sec. 1) codified as Section 9649 of the Code of 1923, undertook to give the Alabama Public Service Commission jurisdiction over utilities

> "who are engaged in this state in interstate commerce not regulated under the acts of the Congress of the United States to the extent that the exercise by said Commission of such authority, powers and jurisdiction over such public utilities in interstate commerce is permissible."

The disclaimer in the utility act of 1920, codified as Section 9768, was broader, denying intent to regulate or interfere with interstate commerce.

The agreed statement of fact excludes any remote possibility of characterizing the pipe line company as a local distributor or utility as a result of its four city-gate or plant-gate contracts, representing its entire deliveries in Alabama of Louisiana gas.

While in the case of the Tennessee Company contract, the delivery was made to several of a group of industrial consumers, the delivery was, in fact, for subsequent handling by the Tennessee Company or its affiliates *through their own pipes* to the point of consumption. Delivery by appellant was strictly a plant gate delivery, automatically stepped down by a regulator to avoid blowing up the consumer's distribution system. There is not even pale justification for misunderstanding the ultimate fact that this was direct, transmission line delivery of gas, as stipulated (R., p. 18), in continuous movement from well to delivery point.

As stated in the stipulation, delivery under the single industrial contract was made in continuous interstate movement to

> "(d) Subsidiaries of the United States Steel Corporation, viz: Tennessee Coal, Iron & Railroad Company and Universal Atlas Cement Company, which purchased gas at their respective meter stations and distributed same by their own lines to their several points of operation." (R., p. 18)

The question is not so much whether the delivery is to the ultimate consumer, as whether the service has in fact "broken bulk" or has changed its characteristic of line flow perceptibly before delivery to the purchaser. The stipulation expressly repudiates any such notion. The movement was "continuous" and "unregulated" to the designated points of delivery. (R., p. 18).

The most recent case in this Court on the subject disposes, upon facts indistinguishable from those at bar, of the contention that metering and measuring the gas, and reducing its pressure, convert line deliveries into intrastate commerce. In *State Tax Commission of Miss. v. Interstate Natural Gas*

Co., 284 U. S. 41, 76 L. ed. 156, the company's pipe line went from Louisiana through a section of Mississippi and back to Louisiana, supplying en route two distributing companies in Mississippi towns, in the same way that appellant here supplies gas under its four contracts, en route from Louisiana to Georgia. There Mr. Justice Holmes said for the Court:

> "The gas flows continuously from the gas fields in Louisiana and obviously, for much the greater part at least, in interstate commerce. But the appellants rely upon business done under two similar contracts made in New York to show that there was intrastate commerce in Mississippi that may be taxed without burdening the main activity that the State cannot touch. Ozark Pipe Line Corp. v. Monier, 266 U. S. 555, 69 L. ed 439, 442, 45 S. Ct. 184; East Ohio Gas Co. v. Tax Commission, 283 U. S. 465, 470, 75 L. ed 1171, 1174, 51 S. Ct. 499. Distributing companies tap the plaintiff's pipes near Natchez and the town of Woodville. The gas withdrawn by the distributors is measured by a thermometer and a meter furnished by the plaintiff which is the only way in which it can be measured. The pressure of the gas is reduced by the plaintiff before it passes into the purchaser's hands. The work done by the plaintiff is done upon the flowing gas to help the delivery and seems to us plaintiff to be incident to the interstate commerce between Louisiana and Mississippi. The plaintiff simply transports the gas and delivers it wholesale not otherwise worked over than to make it ready for delivery to the independent parties that dispose of it b retail. *Missouri ex rel. Barrett v. Kansas Natural Gas Co.*, 265 U. S. 298; *Public Utilities Commission v. Landon*, 249 U. S. 236; *Ozark Pipe Line Corp. v. Monier*, 266 U. S. 555."

The Supreme Court of Alabama also emphasizes, as constituting intrastate action within the meaning of the decision

in the *East Ohio Gas* case, appellant's "use of its office furniture, book accounts, sales contracts, and agents engaged to keep same" (R., p. 77).

The Alabama Court's comment on these activities points out nothing whatever in the record to qualify in any manner the stipulated admission that during the year 1931, appellant's business and activities in Alabama were confined to the sale, transmission and delivery of gas (under the four contracts in Alabama) through its system, or to acts incidental to or directly accessorial (R., p. 19). So the question comes back to the nature of the contracts and deliveries made under those contracts of Louisiana gas in continuous and unregulated flow from Louisiana to the point of delivery.

The vague statements as to other activities are too intangible for analysis. They include (Fol. 81, R., p. 77) loose references to items which were not included in the stipulation and are unheard of in the natural gas transmission business, such as "diversion stations", "ownership of switches" among other mythical facilities of transmission; and the opinion proceeds further out of the record and the art to assume, without the slightest justification in the record or in fact, that appellant maintained and operated devices by which appellant might deliver "natural *or artificial* gas, or mixed, if necessary to be supplied for use." Supplying anything manufactured or mixed or processed or worked over in Alabama is repudiated by the four contracts and by the stipulation. Those contracts called for Louisiana gas; for natural gas. No natural gas was or is produced in Alabama. The Court's inapt and inaccurate use of such terms, foreign to the record and, as we have said to the

art, indicates not so much an analytical finding on this record of acts constituting local business as a vague conception that the location of the operating staff in Alabama and its *possible activities*, rather than what it did, is the real basis for the Court's conclusion.

The controlling argument for local business, found in the opinion on page 77 of the record, consists in these asserted acts:

(1) *"Metering devices."* Interstate gas can not be made the subject of interstate commerce except by transmission line from the distant wells. There is appreciable unaccounted for loss in transmission. The volume varies enormously with changes in temperature and pressure. The contract price is adjusted to a base temperature (60 F.) and a base pressure (of 8 oz. gauge above 14.4 pounds atmospheric) which requires recording and computation at the point of delivery (R., p. 25, Sec. 4).

These are elementary facts of the most obvious nature, inseparable from the operation of an interstate gas transmission system, requiring meter at the point of delivery.

The contracts under which the gas is sold (R., pp. 20, 39) are expressly confined to gas to be purchased by appellant in the Louisiana field and transported to and delivered in Alabama. The recital in the earlier contract, and no less clearly contemplated by the terms of the later one, is that

> " * * * Seller (appellant) has agreed with Buyer on the sale and delivery to Buyer in interstate commerce of natural gas for distribution or sale by Buyer on the terms and conditions herein stated."—R., p. 21.

2) ***"Use of its office furniture, book accounts, sales contracts, and agents engaged to keep same in Birmingham,***

Alabama," which are asserted in the opinion to be "as much a part of appellee's plant and system operating and doing business and capital employed within the State, as the devices * * * employed in * * the transmission to the several points of distribution." (R., p. 77).

The sole query in respect to these activities is whether we accept the stipulation that these agencies and activities were accessorial to the performance of the four interstate delivery contracts and the operation of the interstate system (R., p. 19). For some reason not indicated in the opinion the Alabama Court gave no significance to this conclusive stipulation.

Various corporate activities of this kind were made the basis of the contention, on behalf of the State, in *Ozark Pipe Line Co. v. Monier, supra,* that the company was thereby engaging in local business. The contention was rejected. We submit that it is not possible to reach a contrary conclusion here, in view of the stipulation of the ultimate fact that appellant transacted no business not "incidental to or directly accessorial" to the business of supplying gas under the four contracts (R., p. 19).

(3) Reinforcing its assertion that appellant engages in local commerce, the court below wholly misinterprets the contract of sale (170 So. at 189; R., p. 77):

> *"If further demonstration of the doing of an intrastate business and employment of the corporation's capital in this State is necessary,* this is shown by its contracts fixing prices required of domestic consumers of its natural gas at 40, 42, 43 and 45 cents per thousand cubic feet; the contract charge to commercial consumers at 18 cents per thousand cubit feet; its contract with the Tennessee Coal, Iron & Railroad Company and its several subsidiaries, under a prescribed graduated scale of from 17 to 35 cents per thousand cubic feet; and its requirement of the latter company to take gas for the use of its Bessemer Mill, its Fair-

field and Ensley plants, and the other subsidiaries of the United States Steel Corporation. We know that this mill and these plants in the places named are widely separated.—Hodge et al vs. Joy, et al, 207 Ala. 198, 92 So. 171. It has been noted that the contracts stipulated deliveries and the points thereof; that such connections were to be made by the seller and the equipment for operation was to remain the property of the seller. It is further required by the contracts that service lines connecting or supplying the Fairfield and Ensley plants be located and constructed in a southwesterly direction on the property of the buyer to some point 'mutually agreed upon on the buyer's Fairfield premises'; providing suitable meters that 'may be used in the Bessemer Mill and fairfield and Ensley plants of the buyer and the plants of the other subsidiary companies' of the buyer."

The statement or suggestion that the contracts fixed prices required of domestic consumers or upon resale by the utility is plainly inadvertent, as such is not the case.*

The prices quoted by the Court from the contract were not the re-sale price to the consumer, but the price to be paid by the utility to appellant, based on the universal method, observed, without exception so far as we are advised, by natural gas transportation lines in basing their city-gate price to the utility on the nature of the ultimate use of the gas, viz.: whether domestic, commercial, industrial or unaccounted for. (R., at p. 29). The sliding scale charged the Tennessee Company was the conventional sliding scale universal in contracts which called for large deliveries, such as here, where the contract contemplated a volume in excess of a billion cubic feet annually.

If the transportation from Louisiana and delivery of the gas at the city gate or plant gate in Alabama is in fact a sale and delivery in interstate commerce, the method of determining the price is immaterial.

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* It could not possibly be the case. Those purchasers were local utilities, whose rates to consumers were fixed by public authority. Code of 1923, Sections 9741, 9770.

(4) Again, reference is made by the Alabama Court (R., p. 78) to delivery points and connections, and to the fact that under one contract appellant agrees to make deliveries by service lines at points mutually agreed upon. (See R., p. 40). This provision merely established those plants as points of delivery, where the continuous line flow of gas from the Louisiana field was broken down *by the purchaser* for use. As to this the contract referred to provides (R., p. 43) that:

> "Fourth. The natural gas shall be delivered at a pressure of not less than 30 pounds gauge at some mutually satisfactory location or locations upon the premises of Buyer, and Seller shall there furnish, install, operate and maintain at its own expense regulating and measuring station or stations properly equipped . . . . " etc.

The controlling stipulation in the matter is that:

> "All deliveries made by appellant to all of said purchasers were made under the following conditions:
>
> "The gas sold to the said purchasers was gas delivered in continuous movement from the gas fields in Louisiana or Mississippi without break or interruption, *to the point where it was delivered to and received by the purchaser*, viz: the meter house at which the gas so sold was measured for the purpose of payment."
>
> "In cases of all deliveries made by appellant, the gas was moved under unregulated gas pressure, as produced by the natural pressure of the gas wells, to the designated points of delivery; in all cases in continuous flow from the Louisiana or Mississippi gas fields without cessation from the beginning of movement outside of the State of Alabama until delivery."—R., p. 18.

Reduction in pressure for delivery to the distribution mains of the purchasers is made in the usual way, as described in *East Ohio Gas Co. v. Tax Comm.*, 283 U. S. at p. 468, *and at that point all activity of appellant ceases.* Section 15 of the utility contract (R., p. 33) states the obvious legality, that the purchaser assumed full dominion and risk in the handling and use of the gas under the delivered pressure, after delivery.

(5) The only distinction as to the *Anglo-Chilean Nitrate Co.* case, *supra*, attempted by the Alabama court, is in these words (R., p. 79):

> "Nor are the facts in the Anglo-Chilean case comparable with these. In that case there was no maintenance of an office or other corporate functions, or capital employed, other than the storage of imports in original packages accompanied by qualification to do business in Alabama. All the orders and corporate management were done in New York."

Apparently interstate commerce must be carried on in Alabama spontaneously and without benefit of an office or of corporate management. *Ozark Pipe Line Co. v. Monier* held specifically to the contrary. No one would suggest that a state could interfere with or prevent the usual and necessary incidents to the conduct of interstate commerce without which the commerce could not be conducted at all.* No one supposes that an individual could normally enter into twenty year field contracts for a gas supply, build and operate a thousand miles of high pressure transmission lines at a cost of $38,820,604.39 (R., p. 6) to transport the gas to the utility or large volume industrial market. It is within common knowledge that an organization in corporate form, with its customary incidents, is indispensable to the long distance transportation and sale of natural gas in interstate commerce unless that function is to be assumed by the Government. The latter hypothesis would have made the commerce clause unnecessary.

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* The maintenance of an office and the exercise of "corporate management" are essential to the conduct of any form of interstate commerce. Certainly the exercise of management is; and the corporate form is the usual, practically the universal, medium used. In *Alpha Portland Cement Co. v. Massachusetts*, 268 U. S. 203, and *Cheney Bros. Co. v. Mass.* 246 U. S. 147, 153, 154, the companies maintained offices and sales organizations in the State. In the Alpha Portland case is was admitted on behalf of the State that the company was engaged solely in interstate commerce, and in the *Cheney* case the Court so held.

Obviously a state may lay ad valorem taxes on the property within the state but plainly it can not burden the essential mechanism of interstate commerce by levying an excise tax upon the use of the essential mechanism either directly or indirectly by levying a tax on some trifling or inadvertent local transaction (resting only in the inarticulate impression of the Alabama Court) based on and measured by the value of the entire property used in the interstate business.

Certainly in the transmission and delivery of the gas no argument can be made that this physical system and property were employed in intrastate commerce, and we stand confronted on this record with the fact that every act of appellant done *outside of the physical aspect of transmission and delivery* is regarded by the court below as local business and is taxed on the basis of the ownership for use and use, in interstate commerce, of the interstate system, as the statute is applied by the Alabama Court.

(6) The Alabama court follows its quoted "distinction" of the Anglo-Chilean case with the conclusion that:

> "Under the contracts exhibited and the conduct of business within the State as shown by the agreed statement of facts, the decision in East Ohio Gas Company v. Tax Commission of Ohio et al., 283 U. S. 465, 75 L. ed. 1171, is conclusive of the question for decision."

In other and plainer words, this case was decided by the Alabama Supreme Court on the theory that the corporation was engaged in intrastate business since that was the conclusion in the *East Ohio Gas Case,* based on the operation of local utility service, not remotely analogous here.

(7) The opinion concludes with a quotation from the comment on *Ozark Pipe Line Co. v. Monier* made in *Atlantic*

Lumber Co. v. Mass., 298 U. S. 553, 80 L. ed. 1328. No discernible conclusions with regard to the present case were drawn from the quotation, which was followed by the statement that:

> "We are of the opinion, and hold, that the instant corporation functioned under its charter and the privileges granted by the State under the Alabama Constitution and statute; conducted its business, employed its capital in the State in the sale of natural gas to local consumers by wholesale and retail, and was subject to the franchise tax . . . . . "

As we point out below, the stated conclusion confused the distinction between the permit granted under section 42 and the transaction (doing business) tax under section 54 and left out of question the conclusive stipulation as to the nature of the business done.

It is submitted that this record conclusively shows and that the agreement requires the finding that appellant was engaged solely in interstate commerce. Compare *State ex rel., Panhandle Eastern Pipe Line Co. v. Public Service Comm.* (Mo. 1936), 93 S. W. (2d) 675.*

These being the facts, the tax, sustained by the Supreme Court of Alabama on the theory that the corporation was engaged in intrastate commerce, cannot be imposed, and the Alabama Court's express holding that the Constitution and statutes of Alabama work that result can not stand against the Commerce Clause.

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* There the Supreme Court of Missouri held that the pipe line company, which delivered gas to a subsidiary distributing company in a city and to a large industrial consumer, by means of laterals run from its main line, was engaged in interstate commerce only.

(8) We cite an impressive judicial precedent applicable to industrial deliveries from the Southern Natural's mains and laterals, which followed the receivership of the system in the Fifth Circuit, administered by U. S. District Judge W. I. Grubb. In authorizing the receivers to take an assignment of the Alabama Natural's contracts relating to the supply of certain industries reached by appellant's mains or laterals, the court by decree dated October 1, 1932*, provided:

> "It being represented to and understood by the Court that all of said contracts, so far as the Receivers of Southern Natural Gas Corporation are concerned, contemplate the sale of gas in continuous movement in interstate commerce exclusively, and the Receivers representing that they do not intend or desire to commit the estate to any intrastate business or delivery, the Receivers are instructed to continue that policy, and the matter is reserved for further instructions in the event any contention should be made that deliveries under said contracts constitute intrastate commerce or the transaction of local business.
>
> "In like manner it has been represented to and understood by the Court that all of such sales under contract represent selected contract deliveries and that the defendant corporation and the Receivers have not intended and do not propose to make sales to all applicants or to the general public as a local intrastate utility, and that condition is hereby ordered to be preserved with like reservation for determination by this court if contention should be made to the contrary."

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* In Gelstrom Agency, Incorporated, vs. Southern Natural Gas Corporation, No. 710, In Equity. A certified copy of this decree has been lodged with the Clerk of this Court.

The opinions of the Alabama Court leave the state System in complete uncertainty as to what of the acts of appellant are held to be intrastate, and thus forces an interstate system to pay excise taxes based on the use of property solely in interstate commerce to avoid penalties and forfeitures of contracts.

This appellant does not know and can not tell from the opinion of the Alabama Court what function, facility or agent or activity it must discharge or liquidate in order to avoid the high cost of the tax under section 54 or the risk of heavy penalties for not returning it.

Upon application for rehearing, appellant earnestly sought to have the Alabama court indicate

—where the transactions of appellant, contrary to its intent, crossed the line from interstate to local transactions;

—and what the court conceived to be the measure of the tax for doing the local acts which, if any, employed no capital or nominal capital, since plainly the pipe line system in Alabama was employed exclusively in making interstate deliveries;

—and, particularly, whether the filing of the application for permit under Section 42, and receipt of permit under that section, subjected appellant to a tax based upon its system and property employed solely in interstate commerce in Alabama;*

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* Particularly in view of the Act of 1935 (see infra, p 65) which provides merely that qualifying only constitutes prima facie evidence that local business is being transacted.

—and whether there is any method of avoiding liability for a tax under Section 54 based on its property used solely in interstate commerce, except by incurring the risks of penalties and forfeitures incident to refusal to make an application for permit under Section 42 or return Section 54.

The Alabama Court considered it unnecessary to deal with any of these questions, confusion as to which resulted in impaling the entire interstate business of appellant upon the prong of a heavy excise tax on the one hand or the risk of extraordinary and cumulative penalties, on the other. This casus plainly constitutes a direct and unreasonable burden upon the interstate business, since it requires the interstate business to protect itself from the penalties attaching to refusal to return the tax by yielding to the exaction.

The system presents an insoluble question, backed by penalties and forfeitures, and is squarely within the principle of *International Harvester Company v. Kentucky*, 234 U. S. 216; see *infra*, pp. 64, 67.

II.

THE STATUTE AS CONSTRUED TO IMPOSE THE TAX INVOLVED IS UNCONSTITUTIONAL

An effort was made on behalf of the State to induce the Court below to sustain the tax on the theory discussed in the dissenting opinion in *Anglo-Chilean Nitrate Sales Corp. v. Alabama, supra*, viz: that the corporation, in making a return for the franchise tax under Section 54, is in fact asking for an unlimited permit to do local business with all of its system (however impracticable it may be to convert a 400 pounds

pressure interstate system into a local utility), and therefore can not complain if the permit is granted by the State on the reasonable assumption that all of the applicant's property in the State might be employed in local business, if appellant so desired.

The specific argument of the Attorney General below was that the levy of the franchise tax imposed by Section 54 of the Act of 1927 was in fact a permit authorizing appellant to employ all its property in local business and that the tax is accordingly levied upon the authority or privilege thus voluntarily sought and obtained by appellant to do intrastate business to the limit of its resources in the State, or, for that matter, which it could bring in during the year.

There are demonstrable reasons why that argument is unsound. They are developed below. We preface them with two assertions. Section 54 under which the tax is levied grants no permit. If construed as forcing an interstate business to throw that business in the pot for computation of an excise tax for engaging in some local affair the statute would be arbitrary as a measure and unequal in its application as well as a burden upon interstate commerce.

A. The tax is levied directly upon the doing of business and not upon the mere authority or abstract privilege to do business.

The terms, the history of the development of the corporate excise tax levied by Section 54, and its judicial interpretation make certain that the tax is levied upon the actual and not potential doing of local business and not upon an abstract or unlimited privilege to use in local business property devoted exclusively to interstate commerce, nor is the tax levied for the purpose of forcing upon foreign corporations who do local business a privilege covering property not pro-

posed to be employed in that business for the further purpose of using that property as a rational tax measure.

The Alabama Supreme Court devotes the major part of the opinion in the instant case to the question whether appellant's system operation constituted the doing of local business. That is conclusive that the bare grant of the license was not considered by that court the decisive factor, to which the interstate property of appellant must yield toll. If the mere grant of the license under section 42 was alone decisive, why bother to consider the question of the nature of the business at all, there being no doubt that the license had been granted and that property was owned in Alabama?

When the Circuit Court of Montgomery County considered and determined the entire matter *de novo*, on proof not of future intent but of the 1931 facts before that court in 1936 (R., p. 50-51), the sole decisive question considered and adjudicated by that court was the actual business transacted in 1931, which that court held to have been solely interstate.

The history of the Act and the constitutional requirement is even more compelling. Section 232 of the State Constitution does not make mandatory the exaction of a franchise tax of foreign corporations which *qualify* for *or which obtain the privilege of doing business*, but only of those which "shall do any business in this state."

A review of the history of these taxes will serve to clarify the matter, and show why section 54 of the 1927 Act was a tax on doing business actually rather than potentially.

1—The History of the Tax

The Constitution of 1875 had provided only that no foreign corporation should do business without having at least one known place of business and an authorized agent, and that suits could be brought in any county where the corporation did business. (Art. XIV, Sec. 4; republished in Code 1923, Vol. 1, p. 391). This provision the Supreme Court of Alabama held inapplicable to corporations engaged in interstate commerce "as to such business". *Ware v. Hamilton-Brown Shoe Co.*, 92 Ala. 145; *Nelms v. Mortgage Co.*, 92 Ala. 157.

The first excise tax levied upon foreign corporations as such in Alabama was imposed by the Act of Feb. 13, 1893, (Act 1893, p. 690) which, as amended by the Act of Feb. 18, 1895, was carried into the Code of 1896 as Section 1321. This tax was called an "admission fee," the act provided that no foreign corporation should engage in business within the state without first having paid the fee, which was based in amount upon the total capital stock. This was long before *W. U. T. Co. v. Kansas*, 216 U. S. 1., *Southern Railway Company v. Greene*, 216 U. S. 400, and related cases. The measure of the tax was quite low.

In addition to this admission fee, the general (annual) license law provided (Code 1896, Sec. 4122, par. 55) that

> "All corporations doing business in this state, whether organized in this state or another state or country, not otherwise specifically required to pay a license-tax, shall pay annually the following privilege taxes", etc.

The amount of the tax varied from ten to five hundred dollars, in proportion to the amount of paid-up capital stock of the corporation, a crude basis which survived only tempora-

rily. The tax was contained in the act imposing license taxes on fifty odd specific occupations, such as peddlers, pawnbrokers, and amusement parks.

Thus, when the Constitution of 1901 was drafted, its authors had before them two kinds of excise taxes against foreign corporations—the initial admission fee and an annual privilege tax which was predicated on the same basis (the paid-up capital stock, regardless of situs) as the occupation tax levied on state corporations. The Constitutional Convention undoubtedly desired to place both domestic and foreign corporations on a basis of approximate equality but clearly realized that capital stock should not be employed or embedded in constitutional rigidity as a measure of the tax against foreign corporations in respect to their local business within the reach of state taxation.

Accordingly, while the imposition of a tax was approved and made mandatory by the Constitution, the test of capital actually employed in the business solely within the reach of taxation by the State was made the test and basis of the mandatory requirement: "*but* such franchise tax shall be based on the actual amount of capital employed in this state."

Following the adoption of the Constitution of 1901 the first annual tax directed against foreign corporations as such was imposed by the Act of September 30, 1903 (General Acts 1903, p. 295, Sec. 2; Appendix, p. 16.) This statute provided that every foreign corporation, with exceptions stated, authorized to do business under the general law* "shall pay to the *Judge of Probate* of the county in which it has a resident agent a license fee * * * for the privileges of exercising its corporate franchises or for carrying on its corporate business in such corporate or organized capacity in this State, to be computed

* i.e., under Sections 1316-1324 of the Code of 1896.

upon the basis of the actual amount of capital employed by it within this state. **

This act specifically provided that the taxes thereby imposed were in lieu of the tax levied by Section 4122 of the Code of 1896, and the franchise tax act of 1907 mentioned below provided likewise.

The Act approved March 7, 1907 (General Laws 1907, p. 417; Appendix, p. 18) was the first to denominate the annual levy a "franchise tax," and provided that every foreign corporation *authorized to do business in this State under the laws of the State of Alabama*, except strictly benevolent, educational or religious corporations, shall pay annually to the Judge of Probate, etc., a franchise tax, based upon the actual amount of capital employed in this State by it. The words italicized make plain that the privilege and authority to do business in the State must initiate in some other statute, namely the Act of March 7, 1907, amending sections 1321 and 1322 of the Code of 1896, the original form of which is found in the Appendix on page 15, relating to *admission* fees exacted of foreign corporations (Gen. Laws 1907, p. 422; Appendix, p. 20).

The Act of 1903 referred to first above provided that payment of the taxes therein imposed relieved the corporation of the taxes levied both under subdivision 55 of Section 4122 (the annual privilege tax) and under Section 1321 of the Code of 1896 (the admission fee; Appendix, p. 15), thus requiring the payment of a single annual tax in lieu of or constituting the admission fee and all annual fees. This consolidation was not followed by the legislature of 1907, which restored the admission tax by the elimination of reference to Section 1321

** Thus conforming to the careful restriction of the Constitution.

from a like relieving clause in the franchise tax act of 1907 (Appendix, p. 18).*

The act approved March 4, 1907 (Acts 1907, p. 290) required every foreign corporation to procure from the *Secretary of State* an annual license authorizing the doing of business in Alabama, at a price of ten dollars per annum. Noncompliance subjected a foreign corporation to heavy penalties and rendered all contracts void.

The annual tax required under the acts both of 1903 and 1907 prohibited the doing of any business *other than interstate commerce* unless the tax was paid before it became delinquent. (The 1903 Act, as noted, did not call it a "franchise" tax).

This makes clear that while a permit or license fee, nominal or material in amount, may be exacted for the issue of an annual license, the license is in fact not complete where another statute imposes a further tax on doing business which must be paid *before any business is transacted.* The result is, merely, that two tax agencies are paid for the privilege instead of one and under that theory both taxes are in fact privilege taxes the prepayment of which is a necessary condition to doing business, rather than transaction taxes.

There is great significance in this early situation in comparison with the statutory situation in effect in 1931, under which no such condition attached to the tax in question, levied under Section 54 of the 1927 Act.

By the Act approved March 4, 1907 (Gen. Laws 1907, p. 342) the legislature provided that "the franchises or intangible property and assets" of every person or corporation

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* This act obviously superseded the Act of 1903, although not expressly referring thereto, and not containing a general repeal clause.

engaged in operating in the State should be subject to ad valorem taxation as all other property. Among the enumerated occupations was that of transporting gas by pipe line.

All of the foregoing acts of 1907 were carried into the Code of 1907.

The franchise tax act appears without change as Sections 2391 to 2399 of that Code. Only Section 3291 is set out in the Appendix, (p. 17). The act providing for the ad valorem taxation of intangibles is adopted as Sections 2364, et seq.,* and the $10 license act as Sections 3651-3658.

The admission fee statute (Section 1321 et seq. of the Code of 1896 as amended) is carried over in to the Code of 1907 as Section 3647 ff., with the change of nomenclature, made by the Code Commissioner, from "admission fee" to "franchise tax." *Thus the Code of 1907 contains two separate and independent "franchise taxes" upon foreign corporations,* in addition to the requirement for the assessment by the owner of his franchises, privileges or intangibles for ad valorem taxation.

In *Southern Ry. v. Greene* (1909) 160 Ala. 396, 49 So. 404, the Alabama Supreme Court sustained the latter act (1907 p. 418; Code 1907, sec. 2391) imposing an annual franchise tax based on a sliding percentage of all capital employed in the State, against the contention that its imposition against a foreign railroad company, which had qualified in 1894 and had paid the admission fee required by the Act of 1893 was an impairment of the obligation of contract and denied to the company the equal protection of the law. The Alabama court treated the case as turning on the question whether the "fran-

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* This statute is *not* limited to common carriers, as appears from the chapter and section headings.

chise tax" attacked was a property tax and therefore of a kind which must be uniform, or a privilege or occupation tax, which could be imposed upon all of a class. The court approved a statement that a franchise tax "when imposed on a domestic corporation is a tax on its corporate franchise; when imposed on a foreign corporation is a tax on its business . . .", and that "by whatever name called, the state has the power to impose conditions on foreign corporations, within certain limits, for doing business in the state." 160 Ala. at 406, 407. The court concluded that "the intention of this act was not to levy an assessment on the franchises as property, but to add to the license tax already required an *additional privilege tax for the continued exercise of the corporate franchises in the state,*" (160 Ala. at 409—emphasis ours), and that the tax was valid.

That decision was reversed by this Court (*Southern Ry. v. Greene,* 216 U. S. 400) on the ground that the imposition of the tax deprived the railroad of the equal protection of the law in that Alabama corporations doing precisely the same business in the same way were subjected to no such privilege tax. All of the acts imposing an *annual* franchise tax had up to this time (Code of 1907, and until modified in 1911) applied in terms to "every foreign corporation *authorized* to do business in this state", and thus constituted, wherever made a prerequisite to the doing of business, an *additional* privilege tax for the exercise or continued exercise of the corporate franchises in the state (*So. Ry. v. Greene,* 216 U. S., at p. 411) and in such situation constituted what is correctly termed a privilege tax prospective in its operation rather than a true excise tax upon a transaction actually done or in the course of execution, that is, doing business.

Southern Railway v. Greene was decided in 1910. The enactment of the Revenue Act of 1911 (Gen. Acts 1911, p. 159, Sec. 12, p. 171) took the annual franchise tax on foreign cor-

porations permanently out of the class of permit or privilege taxes, either separately or in conjunction with some other license tax by substituting for the previous clause levying the tax on foreign corporations *"authorized to do business,"* a clause levying the tax on the doing of business, whether authorized or not, by using this clause:

> "All corporations organized under the laws of any other state, nation or territory *and doing business* in this state, shall pay annually the following franchise tax."

But this tax, upon the doing of business, under the 1911 Act was still made a condition to the doing of business by bringing forward the more or less standard provision that

> "No foreign corporation required to pay a tax under this article shall do any business in the State of Alabama not constituting interstate commerce, or maintain or demand any action in any of the courts of the State upon a contract made in this State other than contracts based upon interstate commerce, unless such corporation shall have paid such tax within sixty days after the same became due;"

thus supplementing the license or privilege otherwise obtained and paid for with a further prerequisite to the actual transaction of business, which remained in the law until the significant and important change in 1919 mentioned below.

The same provisions as to an annual tax on the doing of business are carried forward in terms or substance in the Revenue Acts of 1915 (Gen. Acts 1915, p. 386, Sec. 16, p. 397) and 1919 (Gen. Acts 1919, p. 282, Sec. 16, p. 291), with immaterial changes in the rate of tax, but with the material departure mentioned below, in 1919. The provisions do not appear in the Code of 1923 for the reason that the general revenue laws were omitted therefrom.

Thus, this aspect of the Alabama foreign corporation tax, here involved, is seen to be firmly based not upon corporations *authorized* to do business whether they do business or not, but upon those who are doing business, that is, a tax in the nature of an excise upon the actual doing of business rather than as a supplemental tax upon the permit or authority to do business, which was and is covered prospectively and as a true permit or privilege tax by some other provision. The tax upon (or the price for) the *authority or privilege*, as such, was exacted by the original law of 1893 as carried over in Section 3647, of the Code of 1907, and by the annual license fee for the license to do business required by Section 3651 of the Code of 1907.

The wording of the 1911, 1915, and 1919 Acts is unchanged in the Revenue Act of 1923 (Acts 1923, p. 152, Sec. 11, p. 164; App., p. 24), imposing the annual franchise tax upon foreign corporations "doing business in this state," in so far as the tax is directed at corporations "doing business" rather than corporations "authorized to do business"; but the Act of 1919 (and 1923 follows) made a change of the utmost significance upon the contention of the state on this record.

Instead of providing that no foreign corporation shall do any business in the State, not constituting interstate commerce, or maintain or defend any action in the courts of the state, "unless such corporation shall have paid such tax within sixty days after the same became due," as had been brought down from 1903 to 1915, the Act of 1919 (by section 24, at page 294, Appendix, p. 24) dropped this apt characteristic of a privilege tax and substituted a provision characteristic of an excise tax laid directly upon the transaction selected, viz: a penalty for non-payment of 5% for each thirty days of delinquency.

While the Code of 1923 (effective August, 1924) does not contain the general revenue laws, it does contain the old admission fee law, in Section 7214 (called a franchise tax as in the Code of 1907, Sec. 3647), and the annual fee charged for the permit to do business (Sec. 7219).

Section 7216 of the Code of 1923 provides that the admission fee "shall be the franchise tax exacted under Section 232 of the Constitution, and shall be paid but once only." This provision and the Alabama court's oversight of the legislative interpretation (in that the court refers to the annual franchise tax rather than the admission tax as the tax levied pursuant to the mandate of Section 232 of the Constitution (R., p. 68), are not important. It is more important here that any admission, privilege or excise ("franchise") tax must be based upon "the actual amount of capital employed" to comply with Section 232—which necessarily means that the tax must be reasonably related to the actual employment of capital in local business in the State. In short, Section 232 itself is consistent with the Fourteenth Amendment, and, along with the Fouteenth Amendment, is wholly inconsistent with the contention of the State on this record that the grant of a permit subjects the appellant to a tax based on its property employed in interstate commerce whether it does local business or not.

An annual *franchise* tax was, as stated, imposed by the Revenue Act of 1923, brought forward from the 1919 Act, and that Act also provides for the ad valorem taxation of franchises and intangible property (Gen. Acts 1923, p. 194).

Thus the history of the taxation of foreign corporations in Alabama over many years shows five types of tax, namely, *first*, the admission fee (accompanied by filing of charter and initial designation of agent), imposed but once, as a condition

to the right to do any business at all in the State; *second*, the annual permit or license fee, upon payment of which a permit for the year is issued to the foreign corporation; *third*, an annual tax in respect to actually doing business and superadded to the second tax just mentioned and exacted as a condition to doing business and therefore in the nature of a further privilege tax, abandoned in 1919;* *fourth*, the annual franchise tax levied upon those who are actually doing business and measured by the capital actually used in the business, the payment of which is not made a condition precedent and is in the nature of an excise tax upon the transaction rather than on the authority or right to do it; and, *fifth*, ad valorem taxes on property and franchises, as part of the general mass of property in the State.

The tax imposed under the fourth category is the one attacked by appellant in this proceeding.

Such being the history of the permit or excise (franchise) taxes, it is obvious that the tax levied against appellant is laid upon its actual business, is to be measured by factors reasonably relating to the business, and is not levied as a price for an abstract or unused privilege.

2—The Judicial Interpretation of the Tax

This historic certainty is made plain by the decision in *State v. National Cash Credit Ass'n.*, 224 Ala. 629, 141 So. 541, as this Court observed in *Anglo-Chilean Nitrate Sales Corp. v. Alabama, supra.* The Supreme Court of Alabama in the present case has not purported to overrule this Court's interpretation of the franchise tax as a tax laid upon the business actually done rather than upon the right to do it.

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* This hybrid was plainly the result of inadvertence.

It is uncertain how far the Supreme Court of Alabama intended to follow the argument by the State that the tax was based upon an unlimited privilege to do local business.

It did not adopt the suggestion in express terms. It plainly did not attempt to correct this Court's analysis of the Alabama view expressed in the *Anglo-Chilean Nitrate Case* (288 U. S. 218), as follows:

> "Its (Alabama Supreme Court) decisions clearly show that the exaction is laid, not upon the authorization, right or privilege to do business in Alabama, *but upon the actual doing of business.* While the case at bar was pending on appeal there, the state supreme court in State v. National Cash Credit Ass. 224 Ala. 629, 632, 141 So. 541, held that *the mere investment in or ownership of property in the State by a foreign corporation does not subject it to the franchise tax.* Adverting to the language of the statute, it declared that the 'property must be employed in a corporate business done in this state.' On rehearing, May 19, 1932, and after its decision in the case before us, that court said: 'We merely hold a franchise tax to be what it purports to be a tax upon the exercise or use of its franchise in Alabama for the purposes of such franchise; and that, if no corporate activity is conducted in Alabama during the period covered by the tax, the corporation does not owe a franchise tax'."—(Italics supplied.)

The Anglo-Chilean Company had, as here, avoided the severe penalty of guessing wrong as to what the courts would hold as to the nature of the incident to its business, by qualifying under Section 42 and making a return under Section 54. The opinion of this court in the Anglo-Chilean Case was that this circumstance of having taken a permit did not extend the scope of Section 54 so as to permit computation of the tax

under that Section by including property employed in or awaiting interstate commerce.

This court held that the Section is limited for the purposes of the tax to the business actually done; that it was a tax on the business done and not a tax on the mere privilege of doing business.

If the Alabama Court disagreed with that analysis it would have said so. It did quote with approval Mr. Justice Cardozo's assumption that section 54 was a license or had the effect of a license issued pursuant to a voluntary application, but it did not disavow the analysis specifically announced by this Court.

The stated basis of the decision in the present case by the Alabama Court was that appellant "conducted corporate activity", meaning local business in Alabama and is liable for the tax *upon that activity*. The Alabama Court said that the *National Cash Credit* and *Anglo-Chilean* cases were "distinguishable from the instant agreed statement of facts" (R., p. 74), after which the court, as heretofore pointed out holds that Southern Natural Gas Corporation "exercised its corporate functions" in intrastate commerce within the State.

The opinion below is extremely obscure in its references to the nature of the tax, but it is clear that, despite the quotations by the Court from the dissenting opinion in *Anglo-Chilean Nitrate Sales Corp. v. Alabama*, the Supreme Court of Alabama has in no sense whatever held or stated that the opinion of this Court in that case erred in its interpretation of the Alabama law.

The decision below rests upon the erroneous conclusion that appellant was not engaged solely in interstate commerce and upon the further erroneous notion that "corporate activi-

ties" are somehow distinct and separable from the business of the corporation which they activate and are taxable on the basis of all property owned in the State, though both the property and the business activity are devoted exclusively to interstate commerce.

The Alabama Court has been reaching for a rationalization of the distinction between the exercise of a dry corporate power within the state and the exercise of a functional purpose or objective of the corporate charter. Thus, in *Friedlander Bros. v. Deal*, (1928), 218 Ala. 245, 118 So. 508, (referred to as sound law in the opinion in the instant case, R., p. 81), the court held that the making of a lease of property owned by a foreign corporation within the state was not "doing business" or "doing any business" within the meaning of the permit statute and section 232 of the Constitution. This places both the permit or privilege tax of Section 42 and the transaction tax of Section 54 on a functional and not on a dry power basis; and brings the *measure* of the tax under both sections within the familiar tests for the application of the federal corporate excise tax of 1909, that is, the question whether there is active transaction of function as distinguished from mere static powers of ownership or mere potential corporate powers.

There is no question involved here as to what the State *might* do to reach static acts of ownership, custody, isolated leasing, etc. The question is what has the State attempted and we are definitely assured by the Alabama Court in the *Friedlander Case* and in the *National Cash Credit Association Case, supra*, that Section 232 of the Constitution, and these statutes based upon it and using the same test or measure (i. e. doing business and capital employed) apply only *when and to the extent that* the foreign corporation is actually transacting business within the State.

3. The Administrative Interpretation

The State Tax Commission of Alabama has not interpreted the franchise tax here involved as in any sense a "price" for a bare privilege. That price is exacted only on application for permits, under Sec. 42 of the Act of 1927 (App., p. 1). This tax is assessed on a different and later return, after the foreign corporation has actually entered the state and only after it has begun carrying on business.

The Tax Commission does not demand the tax of all those who seek or have obtained a permit to do business. As will be seen from the form of return supplied by the Commission, it is to be made only by foreign corporations who are at the time of the return *doing business in Alabama"* (R., p. 10, Instructions, par. 2).

B. The Tax as applied is a burden on interstate commerce and invalid, regardless of what it is called.

We have undertaken the foregoing analysis of the Alabama statutes because of the assumption, in the dissenting opinion in the *Anglo-Chilean Case,* that the tax is a price paid for a privilege sought rather than a tax upon the business exercised. The record in that case apparently confused the return made for the franchise tax in that case (as here), with the application for permit to do business required by the State law.

In making the return for the tax appellant here did not seek nor did it obtain an unlimited permit to use all its capital

in intrastate business in Alabama*.

It sought nothing by that return (except immunity from the risk of penalty for failing to make a return). It got no permit as a result of the return or the assessment of the tax.

Even if appellant had sought a limited privilege, by its expression of willingness to pay a nominal tax, the privilege was never exercised and the assessment of the tax measured by its entire capital employed in interstate commerce is arbitrary and unreasonable, and results in an unreasonable burden upon interstate commerce.

We discusse these points.

(1) The appellant did not seek or obtain an unlimited privilege to do intrastate business in Alabama in such wise as to authorize the tax in question.

Since failure of a foreign corporation, any of whose transactions within the State may prove to be other than interstate commerce, to qualify initially or to make the reports and returns required by the statutes** subjects the corporation to heavy penalties and to forfeiture of its contracts, or to an accruing daily penalty, there is no alternative but to offer to qualify on a nominal basis, make the returns (accompanied by a disclaimer) and appeal, as here, if the return or qualification is misconstrued.

The question whether an act is wholly local, or whether it is a part of or accessorial to interstate commerce is frequently difficult to determine.

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* Even if there were doubt as to what it got, this could have no significance; as the State could not create taxability by purporting to "grant a privilege" which was not requested and was "conferred" against the protest of the donee.

**Code 1923, Sections 7209, 7211, 7212, 7216, 7220. Acts 1927, p. 171, Sec. 42; p. 177, Sec. 58; p. 178, Sec. 59; p. 182, Sec. 69.

A system which penalizes the right of the citizen to claim immunity from excise taxation under the Commerce Clause by subjecting him to the risk of criminal penalties, forfeiture of contracts for inadvertent and trifling peripheral or marginal acts or which takes his interstate property as a basis for a permit to do trifling local acts as the only alternative to the risk of the penalties, obviously destroys his right to a fair test of his right to immunity under the Constitution as to interstate business. *Wadley Southern Ry. Co. v. Georgia*, 235 U. S. 651, at page 662; *Ex parte Young*, 209 U. S. 123.

Appellant, as shown by the record, initially qualified to do business in Alabama on May 12, 1928 (R., p. 11), constructed an extensive interstate transportation system across the State and is, by the interpretation of the Alabama Court in this case, now confronted with an assessment based on all of its property (including that admittedly used solely in interstate commerce) as the only alternative to threats of penalties more serious than the tax itself.

Domestic corporations similarly engaged are subjected to no such predicament or uncertainty. They pay to Alabama, their state of origin, a known tax on their capital stock actually issued (Sec. 53, Acts 1927, p. 176), without any relation to the proportion of stock to property or investment or to property employed in interstate commerce. A domestic corporation with $3,000 of stock might own and operate unlimited properties of this identical kind, and pay a franchise tax of $6 under section 53, even if it used the property in intrastate commerce whereas appellant is confronted with a tax of over $11,000 measured by property used only in interstate commerce.

As to corporations which establish a permanent system in the State for the conduct of interstate commerce, the con-

struction of the statute which subjects appellant both to the risk stated and to the inclusion of its solely interstate property in the computation of the tax seems clearly to deny equal protection within the scope of *Southern Railway Co. v. Greene*, 216 U. S. 400, *supra*.

Indisputably, under the circumstances stated, qualification for local business, *not in fact intended to be transacted and not in fact transacted*, and the making of annual returns for the franchise tax are not voluntary.

The use of the interstate system as a measure or base for a tax on the local business, which is either non-existent as we insist or *at the utmost* vague and technical, can be sustained on no theory, certainly not on the theory that the appellant has voluntarily consented.

There is nothing in the tax clause (Section 54) which changes the meaning of Section 54 relating to capital employed or enlarges the meaning of Section 232 of the Constitution in that regard, according as the various foreign corporations consent or do not consent that their property used solely in interstate commerce be included in computing the state tax.

Such consent, if in fact voluntarily extended and not coerced by risk of penalties, might conceivably have some bearing on a charge by the consenting corporation that such inclusion *if expressed in the statute* violated the Commerce Clause.

But such consent could not enlarge in any respects the meaning of the statute. It is unbelievable that Section 232 of the Constitution of Alabama or Section 54 of the Act of 1927 require that the franchise tax upon all foreign corporations which do local business in Alabama, however trifling

and whether any capital or not is employed in such local business, must include in its computation property employed solely in interstate commerce. This, however, is the effect of the decision of the Alabama Court here, and as so construed and applied the law is so obviously arbitrary and unrelated to the real privilege, if any, sought and granted and so lacking in equivalence to the exaction against state corporations as to be violative of the Fourteenth Amendment and an obvious and direct burden upon the interstate commerce conducted by appellant.

The arbitrary character of any such construction and the direct threat and burden upon interstate commerce which it involves, as applied to a permanent interstate system of this character, is demonstrable.

An interstate business of the nature of a pipe line, costing over $35,000,000, involving the location of an elaborate but necessary executive organization in some State, directing the entire interstate system, the negotiation and execution and performance of contracts for interstate deliveries, acts of solicitation, the keeping of records and similar accessorial acts, are all plainly necessary or accessorial to the interstate system and business. These functions involve a variety of details each of which, considered alone, can be made the basis of administrative contention on part of the State, or of defenses by dissatisfied privies to basic contracts, to the effect that local business is involved, thus challenging the validity of contracts and subjecting the corporation and its agents to risk of grave penalties in the absence of qualification or annual returns under these Alabama statutes.

Qualification to do local business, although none is intended or actually transacted, solely in order to avoid the consequences of bona fide mistakes as to legal conclusions of

this character is a prudent and established custom and is invariably advised by competent counsel in Alabama.

It is also a sound corporate policy, and a laudable gesture of comity. It indicates a proper desire to comply with the laws of the State, affords full information to the State and its citizens as to the powers and residence of foreign corporations and qualifies an agent for service at the suit of citizens.

The record (p. 4, 5) makes plain that the return of Southern Natural Gas Corporation for the tax was on this basis: "in order to keep its qualification in effect as to any such incidental matter," although, in fact, the return in question (not being an application for a permit) need not have offered, as in effect was done in connection with the initial and annual permit, to acquiesce in a nominal tax under Section 54—the provision here involved. That offer was not an application because the Commission had no authority whatever to issue a permit and did not in fact accept the offer.

The statement was made unconditionally in the return that "all capital employed in the State on December 31, 1930, was directly employed or directly held for the transaction of the company's interstate business and that no franchise tax is payable in respect thereof," (p. 4), and that "All of the fixed property and assets of the corporation *are employed and are hereafter to be employed* in interstate commerce" (R. p. 5).

This Court said in *Anglo-Chilean Nitrate Sales Corp. v. Alabama* that:

> "The fact that appellant qualified to do business in Alabama was not, and rightly cannot be, held to sustain the tax." (288 U. S. at 224.)

Here appellant did not request from the State a general privilege, as there the appellant apparently had done. The appellant here merely sought immunity in the only way it could, by protesting that it was not liable at all but offering to appoint its agent for service and keep up its qualification. The State cannot, on that return either for the permit or the tax, force a permit to do intrastate business upon a corporation carrying on interstate business, in order to make a charge for an unlimited local privilege which was not requested and not exercised.

This proceeding, so far as the state authorities are concerned, is a confused and undiscriminating effort to tax a privilege which it can neither grant nor withhold, and a business which it cannot regulate.

The court below relied in part on *Atlantic Lumber Co. v. Mass.*, 298 U. S. 553, but in that case this Court said (p. 555):

> "If appellant did nothing but transact interstate business, the tax would constitute a burden upon that commerce, and could not stand under the commerce clause of the Constitution."

The opinion below quotes with approval (R., p. 76) from the dissenting opinion in the *Anglo-Chilean Nitrate Case*, which referred to the Ozark case in these words:

> "In these circumstances the corporation asked for and obtained from Missouri a license to 'engage *exclusively* in the business of transporting crude petroleum by pipe line.' 266 U. S. at pages, 561, 567. This, however, was the very business that was incidental to the federal right. The privilege to transport upon the interstate journey was an essential incident of commerce, and so an emanation from the federal power. The court

did not hold that the tax would have been unlawful if laid upon a franchise enamating from the power of the state."

A reference to the license obtained by appellant in this case will show that there is practically no difference on that score between the Ozark case and this one. The application (App., p. 25) asserted that appellant was engaged solely in interstate commerce, and the permit issued by the Secretary of State (App., p. 26) states specifically that appellant is "engaged in the business of interstate transportation and sale of gas for light and heat etc."

Again we assert that the state has no right to convert a return, in terms and practical effect obligatory because of the risk of penalties so grave, into a basis for taxing transactions which are not proposed or desired to be exercised, and in fact were not exercised, meaning, of course, acts other than those constituting or accessorial to interstate commerce. The Southern Natural Gas Corporation has in fact never asserted that it wanted to do more than was done by the Ozark Pipe Line Company. Both companies proposed and engaged in nothing save interstate commerce.

The premise on which Mr. Justice Cardozo made the suggestion either that Section 54 is a permit or that it was voluntarily sought can not possibly be sustained on this record.

(a) Neither the record in the *Anglo-Chilean Case* before Mr. Justice Cardozo nor the briefs in that case made plain that Section 54 is not a permit statute at all. The permit is issuable solely under Section 42 and is neither enlarged nor diminished by anything done or omitted by the foreign corporation or the state under Section 54. While, according-

ly, the state of the record in the *Anglo-Chilean Case* invited its consideration as if the return under Section 54 in that case was in fact an application for a permit, such was not the case.

The assumption that such was the case suspends the entire weight of the suggestion, since the dissenting opinion at the outset makes plain that the dissent was based upon the idea that the Anglo-Chilean Company had made application for an unlimited permit by making the return for the tax:

> "This case does not present the question that would be here if the appellant had not sought for and obtained a privilege or franchise to do a local business in the state of Alabama. There is nothing in the Alabama decisions, and little in her statutes, to indicate that the tax would have been sustained in the absence of such a grant, or that there would have been even an attempt to levy it." 288 U. S., at p. 229.

(b) The Supreme Court of Alabama can not be considered to have subjected the tax levied under Section 54 to the fatal objections to its validity which would attach if the interstate system property be drawn under the tax because of an involuntary application for permit filed, *ex necessitate,* to avoid penalties. The opinion of that court inadvertently but none the less definitely assumes that the appellant applied for an open license and by making the return waived its Federal immunity from a license tax as to its interstate property invested in the State.

> "There, the appellee *exercised** its rights to rely upon federal immunity, if such it had, but applied for a State permit under Sec. 232 of the Constitution to do business in the State, made its return thereunder, and did the acts

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* Here the court evidently intended to say "did not exercise."

of business within the State by selling its gas within the terms of its contracts and affiliations indicated in the agreed statement of facts." R., p. 74.

"No wrong was done the foreign corporation, *voluntarily qualifying under State laws*, by the measurement and exaction of a franchise tax under the requirements of the Constitution and the statutes of this State; the standard of measurement employed being reasonable and unoppressive. The State had the right to exact this franchise tax and the foreign corporation had the right, either to qualify or not qualify. If it desired to exceed its rights under interstate commerce, the permit gave this right." R., p. 75.

(c) We have shown above the extraordinary series of penalty statutes which confront an interstate business of this character, the extreme consequences which attach to an inadvertent local act, the absence of any method to test liability, and the essential compulsion that the interstate business protect itself by taking out a license under Section 42. The act of self-preservation does not constitute a voluntary subjection of the interstate business nor a waiver of federal immunity. The Alabama system is so confused and liability is so unascertainable (as evidenced by the lack of certainty in the opinion of the Alabama Court in this case) that it is to be doubted if the system has sufficient legislative certainty to escape the consequences of *International Harvester Co. v. Kentucky*, 234 U. S. 216. In any event, the solicitation of the permit under section 42 cannot be considered as voluntary in the sense that it constitutes any waiver of federal rights.

(d) The terms of the application for permit under section 42 and of the permit itself show that plaintiff denied the conduct of local business or intention to conduct local business. The license issued to appellant was for "interstate transportation and sale of gas."

(e) There is conclusive evidence in the Alabama statute that qualifying to transact business in Alabama does not carry the implication mentioned in the opinion of Mr. Justice Cardozo and of the Alabama Court in this case. The present successor to Section 54 of the Act of 1927 (Section 318 of the Revenue Act of 1935, at p. 387-8) recognizes clearly that qualification under section 42 (1927) or section 315 (1935) may not in fact be accompanied by the transaction of local business or any intent to transact local business, since the act of 1935 (Section 318) adds these words:

> "Provided, that if a corporation has qualified to do business in this State it shall for the purpose of franchase tax prima facie be held to be doing business in the State of Alabama within the meaning of this Act."

In short, taking out a permit is given only prima facie bearing and is subject to be rebutted. In the face of this provision it is incredible that the Supreme Court of Alabama should give the taking out of a precautionary permit any such drastic effect as a waiver of rights under the Federal Constitution.

If the mere application for and issue of permit subjected all of the property of the licensee in Alabama to inclusion in the computation of the excise tax levied by Section 54 (or Section 318 of 1935), there would be no sense in a statutory provision giving merely prima facie effect to the application for the permit.

The conclusion is unavoidable that the prima facie proviso is incorporated as a complete legislative recognition that Section 54 (Section 318 of 1935) is intended, as

was asserted by this Court in the *Anglo-Chilean Nitrate Case*, as a tax not upon a privilege granted without limit, but as a true excise tax upon the actual transaction of corporate business. This Court in *Cooney v. Mountain States Tel Co.*, 294 U. S. 384, has recognized the distinction between permits or privilege taxes and that specific form of excise tax levied upon a taxable actual transaction, a distinction so transcendently important under our dual system, as witness *Flint v. Stone Tracy Co.*, 220 U. S. 107, and the *License Tax Cases*, 4 Wall, 462. Section 54 and its successor in the Revenue Act of 1935 (Section 318—Appendix, at p. 4) are true transaction taxes, which are levied solely on a transaction subject to state taxation (i. e., doing local business) and must be measured by standards reasonably related to that business.

(f) A further answer is that the Tax Commission granted no permit. It had no statutory authority to grant a permit. It made no assessment based on a permit, but based upon the doing of business and capital employed in Alabama. The official form returned to the Commission made no reference to any license for the year. The permit had been issued by the Secretary of State.

The assessment is, accordingly, a tax and nothing but a tax, levied on the act of doing business in Alabama.

The tax would have been due in respect of any local business in fact transacted whether appellant had qualified or held a license for the year or not, and payment of that tax would not have had the effect of granting a license or avoiding the penalties for not taking out a license.

In short, under the Alabama system, there is no relation whatever between the license on the one hand and the tax on the other.

The tax levied by section 54 is the same in its terms and tests whether appellant has applied for a license or not applied, waived its interstate immunity or not waived.

There is nothing in the Act to justify interpreting it as being based on property used or in transit in interstate commerce for one foreign corporation and as excluding that property for another doing the same acts, merely because one has sought to avoid the drastic penalties by taking a permit and another has preferred to stand on his federal immunity and take the chance of finding, after six years litigation, that he was wrong and must take the consequences as in International Harvester Co. v. Kentucky, *supra.*

(2) The measure of the tax here assessed, considered as laid upon the right to do intrastate business, is unreasonable and oppressive.

If it is admitted, as it must be (*Western Union v. Kansas,* 216 U. S. 1, and R., p. 75, by the Alabama court) that a tax levied upon a privilege granted by the State must bear some reasonable relation to the value of the privilege actually conferred, what can be said in defense of the measure of this tax? The value of the only privilege within the power of the State of Alabama to tax in this case, the privilege of transacting local business, is only nominal, because never exercised. The privilege sought and granted was merely precautionary, to avoid the penal consequences of inadvertent local transactions.

If it were true that appellant obtained, as a result of this limited and practically compulsory return, the naked, undesired and unexercised right to do whatever business in the year 1931 it could, the evidence is beyond dispute that appellant not only did not in fact propose to engage generally in

local business, but, more, the property invested in the State (a long distance high pressure transportation line) was intrinsically incapable of being used generally for local business without supplementing the system for local distribution, following a change into utility status after obtaining a certificate of convenience and necessity from the Public Service Commission. (Code of 1923, Sec. 9795).

Thus, it is clear that whatever the privilege "granted" it was in fact never exercised, could not practicably be exercised and that the local functions were so vague and intangible that the Alabama Court could not delineate them.

In short, the value to appellant of the privilege obtained was never more than the negative value of freedom from the fear of penalties, which can not justify a tax measured by property used or held for use in interstate commerce.

The privilege constituted merely an abstract right to do local business in a corporate form. The State as we have pointed out does not attempt to tax or "exact a price" under Section 54 for this naked privilege and has itself proclaimed that the naked right calls for nothing more than a nominal tax. This necessarily follows since the only privilege tax levied at all, is levied under Section 42, on what, relatively speaking, is a nominal basis—the maximum of the tax being $100. *Even then* the tax is measured by and restricted to property actually employed in functional business and *even then* only when the privilege is actually applied for, on that statutory basis.

Certainly a naked privilege not related to the "doing of business" of a character which is within the control of the State can not be subjected to a very substantial transaction tax levied by Section 54.

The *Friedlander* Case, supra, is final authority for the assertion that the Alabama court regards the "doing business" and "employed in business" clauses of these acts and Section 232 of the Constitution as synonymous. It, therefore, necessarily excludes property employed only in interstate commerce, as well as property merely owned and not employed in functional business within the State.—*State v. National Cash Credit Ass'n*, 224 Ala. 629, 141 So. 541, *supra*.

If, as asserted by the State, the privilege granted is limited only by the charter of the grantee and can be taxed on the maximum potential exercise of all corporate functions, then, on that theory—

(a) The privilege granted to appellant could be subjected to an excise tax computed (1) on its Alabama property employed only in interstate commerce; (2) on its capital at its domicile or in Louisiana, Mississippi or Georgia which theoretically might be removed to Alabama during the year and there employed in local business under the permit.

(b) The National Cash Credit Association, which qualified to do business and made a return showing, *inter alia*, assets on its books of approximately $900,000, consisting of intangibles, would have been subjected to a tax measured by such assets although the domicile of the Association was in New Jersey and it actually did no business in Alabama. That construction was not only repudiated in the case of that corporation but, if held otherwise, would run squarely into Section 232 of the Constitution limiting the tax measure to property actually employed in (functional) business in Alabama, as well as raise grave questions under the Federal Constitution.

Notwithstanding these considerations, it is here contended for the State and the contention has in effect been

sustained by the Alabama Court, that the Alabama tax is a franchise tax upon an unlimited right or privilege to do local business within the State, and that the tax is to be measured, not by the volume of business done or capital actually employed under that privilege, but by the volume of business done or capital to be employed in interstate commerce under a federal Constitutional right which the State may not grant, regulate, withhold or impair, on the theory that the interstate capital might have been devoted also to local purposes.

That result is both unreasonable and unfair; and plainly invalidates the system as applied to appellant on this record.

When a basis of taxation is applied which does not reflect the value of the privilege sought to be taxed, there is a want of due process of law as well as a burden on interstate commerce.

Looney v. Crane Co., 245 U. S. 178;
International Paper Co. v. Mass., 246 U. S. 135;
Western Union v. Kansas, 216 U. S. 1.

There is no reasonable relation between an unused franchise to do local business within Alabama, and the volume of business done within the State by absolute right of the Constitution, as to which the corporation could neither be excluded nor burdened by the State. Such a construction violates not only the commerce clause but the due process and equal protection clauses of the Fourteenth Amendment.

The effect of the assessment in this case is to tax the appellant affirmatively, *for doing nothing whatever subject to excise taxation in Alabama*, an amount which could be assessed only if the corporation were employing $5,523,715 in local business in the State.

In short, the corporation offered to pay for a limited privilege—or caution against penalties—which it did not intend in fact to use; and the State thereupon undertook to superadd a tax based on the erroneous assumption that the privilege was in fact being used to the extent of $5,523,715 of capital.

A tax affirmatively levied on that erroneous hypothesis is clearly arbitrary and attempts to make the corporation pay for a privilege which it is not using.

There is no more reason for basing the tax on the property in Alabama employed solely in interstate commerce than there would be in basing the tax on all of the property or all of the "capital stock" of the corporation.

The exaction of a condition to the right to do local business that a foreign corporation submit to a tax on its interstate business is invalid. Yet that would be the result of the application in this case of Section 232 of the Alabama Constitution and of Section 54 of the Act of 1927, assuming the construction to be (which it is not) that the tax under Section 54 is levied upon the right to do local business only. This is necessarily so even if the supply of gas by appellant under its form contracts is intrastate commerce in whole or in part, which it is not, *because of the inclusion in the computation of the tax of the 53% of appellant's property within the State which lies beyond any delivery point and is used solely for transportation of gas into the State of Georgia.*

In *Virginia v. Imperial Coal Co.*, 293 U. S. 15, 20, the Court sustained an ad valorem tax on intangibles, located in the State, of a corporation doing only interstate business, saying:

> "Respondent is not taxed upon the privilege of engaging in interstate commerce, and decisions, cited by the state court, holding such taxes to be invalid are not apposite. Thus, in Ozark Pipe Line Co. v. Monier, the tax

was held to be bad as one imposed 'upon the privilege or right to do business' of a corporation engaged only in interstate commerce. The same principle of protection was applied in Alpha Portland Cement Co. v. Mass., 268 U. S. 203, 216. Compare *Anglo-Chilean Nitrate Sales Corp. v. Alabama*. Decisions holding invalid license fees or excise taxes *measured in such manner as to burden interstate commerce* and to attempt to exert the taxing authority with respect to business and property beyond the jurisdiction of the state, are also inapplicable. cf. *Air-Way Electric Corp. v. Day*, 266 U. S. 71, 83."

The last cited case involved the validity of an Ohio franchise tax on a foreign corporation engaged partly in intra and partly in interstate commerce, based upon "'the proportion of authorized . . . . stock represented by property owned and used and business transacted" in the State. The Tax Commission based the tax on the entire authorized stock although only about one-eighth was issued. All the property of the corporation (Delaware) was in Ohio. The District Court held so much of the tax as was based on authorized stock representing interstate business invalid and sustained the rest.

This Court held that the act violated both the commerce clause and the equal protection clause of the Fourteenth Amendment.

The Court said:

"In cases involving the validity of the laws of the state imposing license fees or excise taxes on corporations organized in another state, this court has decided:
* * * *

'4. That a foreign corporation is partly, or even chiefly, engaged in interstate commerce, does not prevent a state in which it has property and is doing a local business from taxing that property and imposing *a license fee*

> *or excise in respect of that business*, but the state cannot require the corporation, as a condition of the right to do a local business therein, to submit to a tax on its interstate business or on its property outside the state." * * * * (266 U. S. at p. 81)

It is indisputable that the State may levy an ad valorem tax on the property in the State employed solely in interstate commerce, at the same rate and valuation at which other like property in the State is assessed; but if the value of property so employed and assessed on an ad valorem basis is, in addition, used as the measure of a franchise tax imposed as a condition to the transaction of local business in which the property is not used at all, it is obvious that the interstate operations with the property thus singled out are directly burdened.

It is also plain that such a measure is arbitrary and unreasonable, having regard only to the thing taxed, i. e., the unused local privilege, if section 54 could be construed as purporting to grant a privilege.

This is a much more indefensible levy than the kind of indiscriminate occupation tax invalidated in *Cooney v. Mountain State Tel. & Tel. Co.*, 294 U. S. 384, 79 L. Ed. 934. There at least the company was doing a substantial intrastate business but this Court said that

> "A privilege or occupation tax which a State imposes with respect to both interstate and intrastate business, through an indiscriminate application to instrumentalities common to both sorts of commerce, has frequently been held to be invalid" (294 U. S. at 393).

Here the standard of measurement used bears no "fair and natural relation, in its nominal or average workings, to the privilege conferred."* It bears no relation at all to the alleged privilege conferred.

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* Dissenting opinion by Mr. Justice Cardozo in *Anglo-Chilean Nitrate Sales Corp. v. Alabama*, *supra*, quoted by Alabama Court (R., p. 75).

Appellant has a total investment in its interstate system of some thirty-eight millions (R., p. 6). According to the theory asserted it had the "privilege" of employing this entire capital in intrastate business in Alabama, but no one would assert that therefore the State could measure the tax by the entire capital of the company, because having been granted a permit, there was, for the remainder of the year, no limit upon the amount of capital which the corporation might employ in the State.

It is only on the basis of such capital as is actually employed or proximately intended to be employed* pursuant to the privilege granted that the State Constitution or statutes seek to or can lawfully tax, and the use of its potential capital or capital employed either in other States or in interstate commerce to measure the tax is unreasonable and a violation of due process of law. A tax which is based on property a thousand times greater than the taxpayer's sworn intention as to the property to be employed in local transactions, in the absence of any testimony either before the Commission or the Court that any tangible property was in fact employed or intended to be employed, is plainly arbitrary and a burden upon the interstate commerce of appellant.

Summarizing this branch of the argument, the Alabama statutes, even if considered as levying a tax for the privilege of doing local business, are, as applied to appellant in the imposition of the tax void, and the tax is invalid, for these reasons:

(1) The tax results from and the statute construed to

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* It is indisputable that here appellant did not in fact intend to use any capital in local business, but indicated in its return the willingness to be taxed on the basis of a theoretical use of $5,000 (R., p. 4). That the original intention to do only interstate business was in fact carried out is demonstrated by the proof, in 1936, of what was actually done in 1931.

impose it is accompanied by a system of coercive pealites which force the application for a permit.

(2) The result of the application of the statute to appellant is to impose upon the permit to do local business closely incident (if not, as we contend accessorial) to interstate commerce the condition that appellant subject itself to a tax upon the use of its property solely in interstate commerce.

(3) Because it includes in the computation of the tax appellant's interstate system and property, the imposition is arbitrary and unreasonable, and constitutes a direct burden on interstate commerce.

We lay no emphasis in this summary upon the fact that the Alabama court included, as part of the measure for the tax for so-called local business, property lying east of any delivery point in Alabama and used and held for use solely in transmitting gas into Georgia. This case is one in which, there being no tangible or perceptible local business, any excise tax at all would burden interstate commerce.

CONCLUSION

The judgment of the Supreme Court of Alabama should be reversed, and the cause remanded to that court with directions to set aside its judgment against Southern Natural Gas Corporation, and American Surety Company of New York as surety on its bond, and to affirm the decree of the Circuit Court.

Respectfully submitted,

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